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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1169.

ANGUS M. CANNON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 21, 1885.

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a *Transcript on Appeal.*

Supreme Court, Utah Territory.

THE UNITED STATES, Respondent, *vs.* ANGUS M. CANNON, Appellant.

Filed June 2, 1885.

E. T. SPRAGUE, *Clerk.*

1 *Transcript.*

UNITED STATES OF AMERICA, }
Territory of Utah, } *ss:*

Supreme Court, Utah Territory.

THE UNITED STATES, Respondent, *vs.* ANGUS M. CANNON, Appellant.

At a stated term of the district court of the third judicial district in and for the Territory of Utah, begun and holden at the city of Salt Lake, within and for the district and Territory aforesaid, on the second day of February, A. D. 1885, and continued by adjournment to and including the seventh day of February, A. D. 1885.

Indictment.

THE UNITED STATES OF AMERICA *against* ANGUS M. CANNON.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly
2 impanelled and sworn, on their oaths do find and present that Angus M. Cannon, late of said district, in the Territory aforesaid, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days and continuously between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

JAMES GLENDINNING,
Foreman of Grand Jury.
W. H. DICKSON,
U. S. Dist. Attorney.

Indictment filed in court, properly endorsed a true bill, etc., and with the names of the witnesses, on the seventh day of February, 1885.

A plea of not guilty was made and duly endorsed on the indictment February 13, 1885.

A jury was impanelled and trial commenced April 27, 1885, and on the twenty-ninth day of April, 1885, the jury rendered a verdict of guilty as charged in the indictment.

Motion for New Trial.

(Title of court and cause.)

And now comes the said defendant and moves the court for a new trial and that the verdict herein be set aside for the following reasons, viz:

3 I.

That the court misdirected the jury in matters of law, to wit, in charging the jury as he did and in refusing to charge as requested by defendant in each of the charges requested.

II.

That the court erred in the decision of questions of law during the trial, viz., in admitting the testimony objected to by defendant.

2. In rejecting testimony offered by defendant.

III.

The verdict is contrary to law.

IV.

The verdict is contrary to the law and against the evidence in the case in this, to wit, that there was no evidence in the case sufficient to authorize the jury to find the defendant guilty of the crime charged as defined by the court. That there was no evidence that defendant ever held out to the world as his wives more than one woman or cohabited with more than one woman after the passage of the act making such conduct criminal.

V.

That the juror, A. M. Johnson, was not a qualified juror in the case, for the reason that he had been guilty of living in polygamy or bigamy, and his answers that he did not believe it right to live in that relation were untrue.

4 VI.

The court erred in sustaining the sufficiency of the indictment.

This motion is founded on the files and record of the case, on the testimony of the witnesses, the notes of the short-hand reporter, the charge of the judge and his refusals to charge, and upon the affidavits of Mrs. L. B. Kinney, W. L. Henderson, Bessie Kinney, John C. Cutler, and Angus M. Cannon filed herewith.

ARTHUR BROWN, *Et Al.*,
Att'ys for Def't.

Filed May 9, 1885.

Affidavits Used on Motion for New Trial.

(Title of court and cause.)

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

Mrs. Bessie Kinney, being sworn, says: I am the wife of L. B. Kinney, and was in 1874. During that year my said husband was a magistrate in Bingham, Salt Lake Co., Utah. I know by sight one A. M. Johnson, a juror on the trial of the above-entitled case. He is the same person who was married by my husband to one Mary Roper in 1874, and against whom one purporting to be his wife, a Mrs. Annie Johnson, brought suit for divorce in the probate court for Salt Lake county, Utah. The said L. B. Kinney, my husband, was attorney for her, and the Johnson named as defendant in that suit was the same person who had married Mary Roper, and
5 who was a juryman in the above-entitled case. He was married to Mary Roper before the divorce was procured by Annie Johnson. I know of said Johnson living with Mary Roper as his wife, in Henderson's house in Bingham, in the year 1874, and they were living there together when Annie Johnson came on and procured the divorce.

BESSIE KINNEY.

Subscribed and sworn to before me, this eighth day of May, A. D. 1885.

[SEAL.] C. O. WHITTEMORE,
Notary Public.

(Title of court and cause.)

SALT LAKE COUNTY, *ss:*

W. L. Henderson, being sworn, says: I know A. M. Johnson, of Bingham, one of the jurors in above-entitled case. I am acquainted with his present wife, whose maiden name I am told was Mary Roper. He lived with her in the year 1874 as his wife; I know the fact, because on July 6, 1874, I rented him a house in Bingham.

W. L. HENDERSON.

Subscribed and sworn to before me, this eighth day of May, A. D. 1885.

[SEAL.] C. O. WHITTEMORE,
Notary Public.

6 (Title of court and cause.)

SALT LAKE COUNTY, *ss:*

Angus M. Cannon, being sworn, says: I am the above-named defendant; at the time of the impanelling and swearing the jury in said cause I did not know and had no means of knowing the facts relative to the juror, A. M. Johnson, set forth in accompanying affidavits, or that he had ever lived in or practised polygamy, and had no means of laying the foundation for making that challenge.

ANGUS M. CANNON.

Subscribed and sworn to before me, May 9th, 1885.

H. G. McMILLAN,
Deputy Clerk, Third District Court.

(Title of court and cause.)

SALT LAKE COUNTY, *ss:*

John C. Cutler, being duly sworn, says: I am clerk of the probate court in and for said county of Salt Lake. I have examined the files of that court, and find that Annie E. Johnson procured a divorce from A. M. Johnson March 1, 1875. The copies complaint therein, statement of defendant, and decree of court are hereto attached and made a part hereof.

JOHN C. CUTLER.

7 Subscribed and sworn to before me this eighth day of May, A. D. 1885.

[SEAL.] JOHN C. CUTLER, *Probate Clerk,*
By H. S. CUTLER, *Deputy.*

In the Matter of Divorce.

In Probate Court, Salt Lake County. Elias Smith, Judge.

MRS. ANN E. JOHNSON, Pl'ff *vs.* ARMON JOHNSON, Def't.

TERRITORY OF UTAH, *County of Salt Lake:*

The above-named plaintiff, Mrs. Ann E. Johnson, being by me duly sworn, on her oath says: That she was lawfully married to the above-named defendant, Armon Johnson, on the second day of December, A. D. 1873, in the city of Hamilton, White Pine, Nevada, and that on the eleventh day of July, 1874, the said defendant left her in said place, taking with him all my own property, consisting in $700 in money and $100 in dresses and other clothes, even to my gloves, and that his whereabouts I could not ascertain until quite lately, when I heard he was living at Bingham Canyon, Utah, when I found him on the 16th February, 1875, living with a woman whom I learned was married to him by a justice of the peace, whose affidavit or oral testimony I will produce on the hearing of this application. I would ask your honor to grant a hearing of this petition as soon as convenient.

ANNIE JOHNSON.

8 Subscribed and sworn to before me at Bingham Canyon, February 24th, 1875.

[SEAL.] L. B. KINNEY,
Notary Public.

Statement of Defendant on Divorce.

TERRITORY OF UTAH, *County of Salt Lake:*

In Probate Court, Salt Lake City. Elias Smith, Judge, Salt Lake County.

MRS. A. M. JOHNSON, Pl'ff *vs.* A. M. JOHNSON, Def't.

To the honorable the probate judge of said county, Elias Smith, judge:

In the above-entitled action, wherein the plaintiff, Mrs. A. M. Johnson, has applied to your court for the relief therein set forth by complaint filed by said plaintiff, praying that the bonds of matrimony between the said parties be dissolved, I would here state that I should not oppose or in manner interfere to or hinder her, said plaintiff, in procuring the relief she, said plaintiff, prays for in her said petition, and would ask your honor to grant her request, thereby dissolving the bonds of matrimony between us.

A. M. JOHNSON.

Witness-:
L. B. KINNEY.
HUGH CAMPBELL.

Filed in the probate court, March 1, 1875.

9 *Bill for Divorce.*

TERRITORY OF UTAH, *County of Salt Lake:*

Probate Court for said County.

ANNIE E. JOHNSON *vs.* ARMON M. JOHNSON.

This case came on for hearing in the probate court for the county of Salt Lake, Territory of Utah, at the December term of said court, 1875, to wit, on the first day of March, 1875, upon the petition of the plaintiff, the said Annie E. Johnson, herein filed and the evidence adduced, the said defendant, Armon M. Johnson, failing to appear and answer the allegations made in plaintiff's complaint, the same were taken as confessed, and after hearing the evidence adduced *ex parte* the court is of the opinion thereof that the said parties cannot live together in peace and union in consequence of the unlawful conduct of the said defendant, he having deserted the said plaintiff without cause and violated his marriage covenant by marrying another woman; and it is ordered, adjudged, and decreed that the bonds of matrimony heretofore and now existing between the said plaintiff, Annie E. Johnson, and the said defendant, Armon M. Johnson, be, and the same are hereby, forever dissolved, annulled, and made void.

Salt Lake City, March 1st, 1875.

E. SMITH,
Probate Judge.

10 *Order Overruling Motion for New Trial.*

(Title of cause.)

Comes now defendant and files his motion for a new trial in this case and to set aside the verdict of the jury, and affidavits are filed in support of said motion, and said motion is now argued by counsel for defendant, Arthur Brown and J. G. Sutherland, Esquires, and by Messrs. W. H. Dickson and C. S. Varian for the prosecution; and the court being now fully advised, and it appearing to the court that the verdict is supported by the law and evidence, and that no error occurred in the trial of said case, it is by the court ordered that defendant's said motion for a new trial and to set aside verdict be, and the same is hereby, overruled.

To which ruling and order defendant excepts.

Made and entered May 9, 1885.

Judgment.

(Title of cause.)

The defendant, Angus M. Cannon, having been lawfully convicted of the crime of unlawful cohabitation, and being now before the court for sentence, and having nothing to say why sentence of the court should not be pronounced, the sentence of the court is that you, Angus M. Cannon, do forfeit and pay to the United States of America a fine of three hundred dollars, and, further, that you, said defendant, be confined and imprisoned in Utah penitentiary for a term of (6) six months, and that you be also further imprisoned and held in custody until the above fine against you be fully paid and satisfied.

Made and entered May 9, 1885.

11 *Bill of Exceptions.*

District Court, Third Judicial District, Territory of Utah, County of Salt Lake.

THE UNITED STATES *vs.* ANGUS M. CANNON.

This case came on for trial on the 27th day of April, 1885, and after a jury was empanelled and sworn, and the counsel for the prosecution had called a witness, counsel for the defense objected to the giving of any evidence under the indictment, on the ground that the indictment is defective and does not charge any criminal offense, and that it does not charge any offense under the statute of the United States, or charge the offense described in the statute either in the statutory words or equivalent words, and especially that it does not show in any manner that the person charged is a male person, and is insufficient to warrant a verdict or support a judgment of conviction.

The court overruled the objection, and the defendant, by counsel, then and there excepted.

Clara Cannon a witness called for the prosecution, was sworn,

when defendant, by counsel, renewed the aforesaid objection to the indictment, with the same ruling by the court and the same exception by defendant above noted.

12 The witness testified: My full name is Clara C. Cannon. I know the defendant. I have been his wife. I was his wife. I was married to him about ten years ago, and have since lived at 246 First South street, Salt Lake City. I live there now, and have lived in the same house since shortly after I was married. The defendant has lived in the same house part of the time, and in the same house during the past three years. I have one living child, which is a child of that marriage, born January 11th, 1882. I have had two other children by that marriage, both born before the living one. In this house I occupy two rooms on the ground floor, a parlor and a dining-room, on the east side. My kitchen is back, not attached to my part of the house. I have occupied this part of the ground floor since I first went to live in the house. There is a hall running through the house on the ground floor, and the rooms I occupy on that floor are on the east side of the hall. I know Amanda Cannon. She has lived in the same house that I live in during the past three years. She has occupied, on the ground floor, two rooms on the west side of the hall, beside her kitchen, which is attached to the back of the main building, and is not the kitchen I use. I suppose Amanda Cannon is defendant's wife. I have heard him speak of her as his wife, as Mrs. Cannon, and she has lived in the house ever since I went to live there. She has nine children, I think. During the past three years I think all her children have been living there at home, but not all the time. My little child lives with me in my part of the house—I mean the child of this marriage. The children of Amanda Cannon live with her in her part of the house. During the past three years, and prior to the month of February in this year, the defendant has been in the habit of taken his meals with me, in my

13 part of the house, a portion of the time, about one-third of the time. There were stated intervals; he took his meals with me every third day—with me and my children. I have a son and daughter grown up, and two orphan children. He took his meals with me and the child of this marriage and the other children every third day. He took his meals with Amanda Cannon and her family one-third of the time. He took all three of his meals with me every third day—on week days and on Sunday morning he had breakfast at my house—that is, he took his meals with me two days of each week and also his breakfast Sunday morning, which made one-third of the time. On Sunday he took his dinner at Sarah's and his supper at Amanda's. There are four rooms on the second floor of the house used as bed-rooms, and a hall with two of the rooms on either side of it. The rooms open into the hall. During the past three years I have occupied the bed-room in the northeast corner, and Amanda has occupied the one in the southwest corner of the house. The defendant has occupied the bed-room in the southeast corner. The room occupied by me as a bed-room and the one occupied by the defendant as a bed-room are on the same side

of the hall, and there is no intervening room. The house I speak of is in Salt Lake county, Utah Territory.

Cross-examined:

My oldest daughter is twenty-three years old and my son twenty. I have a little girl, Clara Hardy, twelve years old, and a little girl ten years old, who are orphans. Their mother was a niece of mine and when she died she left them to me. These, with my little daughter Alice, three years old past, are the members of my family.

My daughter Alice was three years old last January. The two
14 orphan children have lived with me for the last five years. The two little girls and my oldest daughter and the youngest daughter have occupied my room with me. We have two beds, and have all slept in that room.

Q. State whether that state of things and that relation with your children and the orphans continued until February last?

Objected to by the prosecution on the ground that it is immaterial, irrelevant, and incompetent. The objection was argued, the prosecuting attorney announcing the objection was on the relevancy, materiality, and competency of the evidence offered, and that the objection was not on the ground it was not a proper subject of cross-examination or that the offer was out of order, but that any proof tending to show non-access was immaterial, and defendant's counsel admitted and stated to the court that the evidence was offered as tending to show, with other evidence to be given, non-access during the time charged in the indictment, and as tending to disprove any presumption of sexual intercourse which might be raised by testimony of the witness. The court sustained the objection, stating that the question presented by the objection had been deemed by both parties as being properly raised by the interrogatory objected to, and the defendant by counsel then and there excepted.

Q. Was Amanda Cannon married to defendant prior to the time you was married to him?

Counsel for the prosecution objected to the question as irrelevant, incompetent, and immaterial. The court sustained the objection, and defendant, by counsel, excepted to the ruling. The following questions were severally propounded to the witness, counsel stating that the sole purpose for which the questions were asked was to establish non-sexual intercourse.

15 Q. Did you hear and know of the passage of the act of Congress usually called the "Edmund's Act," about the time it was passed.

Q. What had been the habit of defendant prior to that time as to his occupation of your room and bed, and the room and bed of Amanda Cannon?

Q. About the time of the passage of that law did he say anything to you and the other members of his family in respect to his intention to not violate that law, and what did he say?

Q. Did you assent to what he proposed?

Q. After that did any change occur in his habits as to occupying your room and bed, and what, if any, was the change?

Q. After March 22, 1882, has the defendant at any time occupied your room or bed, or has he had any sexual intercourse with you?

To each of these questions the prosecuting attorney objected, on the ground that the evidence sought was irrelevant, immaterial and incompetent, and the objections were based solely on these grounds and not to the form of the questions, or time, or manner of offering the evidence.

The court sustained each objection, and to the ruling on each the defendant by counsel excepted.

GEORGE M. CANNON, a witness sworn for the prosecution, testified:

My father's name is Angus M. Cannon; he is the defendant here. My mother's name is Sarah M. Cannon. I have heard my father state he was married to Amanda Cannon.

Q. Have you heard your father state he was married to Sarah Cannon?

Defendant by counsel objected to the question on the ground it is immaterial; that Sarah Cannon is not named in the indictment, or any marriage with her charged.

16 The prosecuting attorney explained that he intended to show Sarah and Amanda Cannon were married to defendant by the same ceremony, and that he offered the evidence to show whom he had the right to call as a witness.

The court overruled the objection and allowed the evidence for this purpose, and the defendant excepted to the ruling.

WITNESS. I have heard my father say he was married to my mother and Amanda Cannon at one and the same time.

ANGUS M. CANNON, Jr., sworn for the prosecution, testified:

My father's name is Angus M. Cannon and my mother's name is Amanda Cannon. I have lived during the last three years in the same house with my father and mother. My mother has nine children; eight of them are living at home and have during this period. I took my meals there and slept there on my mother's side of the house. Have taken my meals at the same table with the rest of the family. My father has taken his meals about one-third of the time at Clara's, one-third of the time at Sarah's, and one-third of the time with my mother. About every third day he takes his meals with my mother and her children. There are four sleeping apartments in the second story of the house; two on each side of the hall-way which goes north and south, and the rooms on each side open into the hall. During the period mentioned Clara C. Cannon has occupied the northeast bed-room, my father has occupied the southeast, and my mother the southwest bed-room.

Cross-examined:

Clara Cannon has occupied the northeast bed-room to my knowledge five or six years.

Q. Who occupied it with her?

17 Objected to as immaterial, etc. Objection sustained and defendant excepted.

My father has occupied the same house with Clara and Amanda Cannon. I have not been at home continuously for the past three or four years. I have been away probably between five and six months, and, with this exception, I have been there more than three years.

Q. Do you know where your father during that time passed his nights?

Objected to. Objection sustained, and defendant excepted to the ruling.

The prosecution here rested.

GEORGE M. CANNON recalled for further cross-examination:

The substance of what my father said about his marriage to Sarah and Amanda Cannon was that he married them at the same time. He said he married them prior to any act against polygamy, and when he considered it legal. He perhaps stated the year, but I don't at present recollect it. I am in my twenty-fourth year.

CLARA C. CANNON recalled by the defendant and testified:

I am a member of what is called the Church of Latter-day Saints, and I have been a member for twenty-four years. The defendant is also a member of that church. I don't know how long he has been a member, but it is ever since I first knew him. Mrs. Amanda Cannon is a member of the same church, and has been since I first knew her—that is, thirteen years.

Q. Was Mrs. Amanda Cannon married to the defendant prior to your marriage to him?

Objected to by counsel for prosecution as irrelevant and
18 immaterial. Objection sustained, and defendant, by counsel, excepted to the ruling.

Defendant's counsel then made the following offer of proofs: We offer to prove by this and other witnesses to be called that Amanda Cannon was married to the defendant before the marriage with this witness; that prior to the passage of the Edmunds law he had alternately occupied the sleeping-room and bed of each; that each, with her family, occupied, and still occupies, separate apartments, including separate dining-rooms and kitchens; that after the Edmunds law had passed both houses of Congress, and before its approval by the President, the defendant announced to witness, Amanda, and their families, that he did not intend to violate that law, but should live within it so long as it should remain a law, and at the same time assigned his reasons for so doing, and there-

after, and during the times alleged in the indictment, he did not occupy the rooms or bed of or have any sexual intercourse with the witness, and to this extent, by mutual agreement, separated from the witness; that, during all the time mentioned in the indictment, the two families have taken their meals in their respective dining-rooms; that defendant has taken his meals with the witness and her family in her dining-room two or three days each week, has provided for the support of the witness and her family distinct from other family expenses, and allowed them to occupy separate apartments in the same house occupied by him and Amanda, and this is the extent of his relations with the witness; and also that that the defendant was financially unable to provide a separate house for witness and her family; also that the witness and her family and Amanda and her family are dependent on the defendant for their support.

19 To this offer and each paragraph thereof the prosecution, by counsel, objected, and the objection was sustained by the court, and the defendant excepted to the ruling.

The foregoing is all the evidence given in the case.

The judge then instructed the jury as follows: The indictment in this case charges that the defendant on the first day of June, in the year of our Lord 1882, and on divers other days continuously between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. If you believe from the evidence, gentlemen of the jury, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.

It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed or slept in the same room; neither is it necessary that the evidence should show that within the time mentioned he had sexual intercourse with either of them.

I will state the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence and of the fact, and if you find the defendant guilty you will say in your verdict, "We, the jury, find the defendant guilty in manner and

20 form as charged in the indictment;" and if you find him not guilty you will say, "We, the jury, find the defendant not guilty."

No further or other instructions were given to the jury.

The defendant requested the judge to instruct the jury as follows:

1. The offense charged is that defined in the third section of the act of Congress entitled "An act to amend section 5352 of the Revised Statutes in reference to bigamy, and for other purposes," approved March 22d, 1882, commonly known as the "Edmunds act.",

This instruction was refused, and to such refusal defendant duly excepted.

2. That section is applicable to Utah Territory, and provides that if any male person here since March 22d, 1882, has cohabited with more than one woman he shall be deemed guilty of a misdemeanor.

This instruction was refused, and to such refusal defendant duly excepted.

3. This section does not apply to male persons who have at successive periods cohabited with lawful wives, but only to contemporaneous cohabitation with two women.

This instruction was refused, and to such refusal the defendant duly excepted.

4. Cohabitation includes living together as members of one family, a consorting in social intercourse, and eating and lodging together. They need not occupy the same bed, but there must be an equivalent intimacy.

This instruction was refused by the court, and to such refusal the defendant duly excepted.

5. The word "cohabit" in this section is to be understood in a technical or restricted sense. It does not apply to all persons
21 who live with each other under one roof as members of one family, but only to adults of different sexes who live together in the manner that husbands and wives do, including the intimacy of occupying continuously or for recurrent periods the same bed.

This instruction was refused by the court, and to such refusal the defendant duly excepted.

6. (Requested if the last refused.) The word "cohabit" in this section is to be understood in a technical or special sense. It does not apply to all persons of opposite sexes who live with each other under one roof as members of one family, but only to adults of different sexes living together in the manner that husbands and wives do. So understood, it must include a continuous or recurrent occupying of the same apartments in the manner usual with persons of opposite sex who live in sexual intimacy.

This instruction was refused by the court, and to such refusal defendant duly excepted.

7. No case is within this section which does not include such association of a man with two women in their mode of living as to make it an example of immorality by necessarily indicating an habitual intimacy with each of two or more women by mutual consent.

This instruction was likewise refused, and defendant excepted.

8. The cohabitation which is made a misdemeanor by this section is an habitual residence or dwelling by a man with two or more women in intimate sexual relations.

This instruction was also refused by the court, and defendant duly excepted.

9. The ingredients of this offense are, first, that the person charged be a male person; second, that he has lived or dwelt with two
22 women, either continuously at the same time or with each in alternate periods of time; third, that he has so lived with each of two or more women in such personal intimacy as to indicate that he has had sexual intercourse with them, respectively, at his and their pleasure.

This instruction the court also refused to give, and to such refusal the defendant duly excepted.

10. The court will interpret this Edmunds act by its terms and in view of the actual situation in this Territory of which the court is judicially cognizant, and thus deduce that Congress intended to apply a corrective to polygamy and the anomalous status produced by its long practice.

This instruction was also refused, and the defendant duly excepted.

11. The act is intended to prevent any future polygamous marriages, and to prevent the continued cohabitation of persons who are already in polygamy. The section making cohabitation a misdemeanor has special or primary application to a cohabitation with a plurality of wives. This obvious intention indicates the ingredients of the criminal cohabitation; that it is a living together in the sexual intimacy usual between persons united in the marital relation, immoral in example for not having the sanction of lawful marriage, and pernicious in producing an illegitimate offspring.

This instruction was refused, and defendant excepted.

12. This act legitimizes all children born prior to January 1, 1883; it authorizes amnesty to all offenders prior to its enactment, and thus it is shown that the act was passed in view of the long existence of polygamy in this Territory, and the multitudes of children born therein; it is merciful to those who have broken the
23 laws against polygamy, and humane and paternal to the children born in polygamy.

This instruction was refused, and the defendant excepted.

13. This act does not command polygamous fathers to abandon their children nor to break off all communication with their mothers. Such fathers are at liberty and under the strongest moral obligation to support both. He may hold any friendly and familiar relations, other than sexual, naturally incident to the proper discharge of such duties. All his social familiarity with the mothers of such families, established prior to the passage of said act, not shown to include all the particulars of cohabitation as the court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal.

This instruction was refused, and the defendant excepted.

14. The existence at the time of the passage of the Edmunds act of a polygamous relation between the defendant and the women mentioned in the indictment, though an illegal relation, is not, and cannot be made by the statute, evidence of any fact necessary to or tending to a conviction for violating the third section. Any enactment intended for such a purpose would be *ex post facto* and void.

This instruction was refused, and the defendant excepted.

15. The law presumes innocence, and therefore that all persons who were cohabiting when the Edmunds law took effect contrary to the provisions of that act then ceased to do so.

This request was refused, and the defendant excepted.

16. No fact in the conduct of the defendant subsequent to the passage of the Edmunds act can be made more significant of guilt in violating the section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment prior to the passage of that statute.

This request was refused, and the defendant excepted.

17. The defendant is entitled to show his marital and parental status at the time of the passage of the Edmunds act, to explain his subsequent conduct towards the women mentioned in the indictment, and to show an innocent and laudable motive therefor.

This request was refused, and the defendant excepted.

18. For this purpose he may show that he had families of children by said women respectively at and prior to the passage of said act; that such women and their children had been and were still dependent on him for their support; that he has continued since to support them; that he has visited them for that purpose, and as the father of said children, and that he has not had sexual intercourse with such women since the passage of said act, and no inference of cohabitation can be drawn from the fact of such relations, from the fact of furnishing support for such mothers and children without living with them, nor from the fact of visiting them, taking meals with them, nor from his living in a separate suit of rooms in the same house, belonging to himself, as that occupied by them, if they occupied separate apartments and habitually live as a separate and distinct household, nor can such inference be drawn from all such facts. They do not of themselves constitute cohabitation.

This request was refused, and the defendant excepted to the refusal.

19. There is no evidence in this case tending to show this defendant recognized Clara C. Cannon as his wife, or held her out to the world as such, since the passage of the Edmunds bill and within the dates named in the indictment, and without such proof the jury should acquit the defendant.

This request was refused, and the defendant excepted to the refusal.

20. If the jury find that the defendant has not held out to the world and announced and recognized as his wife the Clara C. Cannon named in the indictment, since the passage of the Edmunds bill, and within the dates named in the indictment, then they should acquit the defendant.

This request was refused, and to the refusal the defendant excepted.

21. Sexual intercourse is a necessary element of the crime of cohabitation; and if the jury find the defendant has not had sexual intercourse with both Clara C. and Amanda Cannon since the passage of the Edmunds bill, and within the dates named in the indict, then they should acquit the defendant.

This request was refused, and to the refusal the defendant excepted.

22. In order to find the defendant guilty of the offense charged it must appear that the defendant had gone through the forms of marriage with both of the women named in the indictment, Amanda and Clara C. Cannon; that it not appearing in this case that he was ever married to Clara C. Cannon, the jury should acquit.

26 This request was refused, and to the refusal the defendant excepted.

23. If the jury find that there never was the form of marriage between Clara C. Cannon and the defendant, they should acquit.

This request was refused, and to the refusal the defendant excepted.

24. There can be no conviction under the indictment in this case, for the reason that there is no charge that the defendant was ever married to either Amanda or Clara C. Cannon, nor any charge that he held out either or both as his wives.

This request was refused, and to the refusal the defendant excepted.

The defendant also excepted to the charge given by the judge to the jury as follows: To that portion of the charge substantially in these words:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant lived in the same house with Amanda and Clara C. Cannon and ate at their respective tables one-third of his time, or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty."

Also to that portion of the charge which instructs the jury that to constitute the offense it is not necessary the defendant should have occupied the same room, or slept in the same bed, or had sexual intercourse with either of the women named in the indictment.

The jury, after being instructed as aforesaid, retired, and returned a verdict of guilty on the twenty-ninth day of April, 1885.

27 The defendant moved the court to set aside the verdict and for a new trial on the grounds:

First. That the court misdirected the jury in matters of law, and erred in the decision of questions of law arising during the course of the trial.

Second. The verdict is contrary to law.

Third. The verdict is contrary to the evidence.

The motion was heard and overruled on the ninth day of May, 1885, and to the ruling the defendant excepted, and afterwards, on the same day, judgment on the verdict against the defendant was rendered, sentencing him to six months' imprisonment and three hundred dollars fine.

And the defendant assigns and specifies the following errors:

Error in law in admitting evidence under the indictment and holding the indictment sufficient.

Error in law in excluding evidence offered by defendant on the trial, in the several instances shown in the foregoing bill, and by the several rulings to which the defendant excepted.

Error in law in refusing each of the defendant's requests for instructions to the jury.

Error in law in the instructions given to the jury.

Error in law in refusing defendant's motion for a new trial on the grounds of misdirection to the jury in matters of law, and errors in the decision of matters of law arising on the trial.

Error in refusing to grant a new trial, on the ground that the evidence did not support the verdict, and in not holding the verdict, was contrary to the evidence.

28 Filed and served on U. S. district attorney, May 14, 1885, with notice of settlement.

F. S. RICHARDS,
SUTHERLAND & McBRIDE,
ARTHUR BROWN, AND
BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Defendant.

The foregoing bill of exceptions is full and correct, and the same is hereby settled and allowed.

Dated May 25, 1885.

C. S. ZANE, *Judge.*

Refiled after settlement, May 25, 1885.

(Title of court and case.)

Please take notice that the said Angus M. Cannon, the appellant herein, appeals to the supreme court of Utah Territory from the order of the court overruling the motion for a new trial, made on

the ninth day of May, 1885; also from the final judgment rendered herein against the appellant on said ninth day of May, 1885.

Dated May 25th, 1885.

F. S. RICHARDS,
SUTHERLAND & McBRIDE,
ARTHUR BROWN, AND
BENNETT, HARKNESS & KIRKPATRICK,
Attorneys for Appellant.

Filed May 25, 1885.

29 Copy served May 25th, 1885.

W. H. DICKSON,
U. S. Dist. Att'y.

We certify and it is stipulated and agreed that the foregoing is a full, true, and correct transcript in this case.

Dated June 2d, 1885.

WM. H. DICKSON,
U. S. Dist. Att'y.
F. S. RICHARDS *et al.*,
Att'ys for App't.

30 THURSDAY, *June 11th*, A. D. 1885.

* * * * * * * * *

THE UNITED STATES, Respondents,
vs.
ANGUS M. CANNON, Appellant.

From 3d. Dist.

This cause, coming on regularly for hearing, was argued by J. G. Sutherland, for appellant; W. H. Dickson, for respondents, and further by Arthur Brown, for appellant.

FRIDAY, *June 12th*, A. D. 1885.

* * * * * * * * *

THE UNITED STATES, Respondents,
vs.
ANGUS M. CANNON, Appellant.

From 3d District.

This cause was further argued by Arthur Brown, M. Kirkpatrick, and J. R. McBride, for appellant, submitted, and taken under advisement.

30½ SATURDAY, *June 27th*, A. D. 1885.

* * * * * * * * *

THE UNITED STATES, Respondents,
vs.
ANGUS M. CANNON, Appellant.

From 3d Dist.

This cause having been heretofore argued and submitted, and the

court being sufficiently advised thereupon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and is hereby, affirmed.

31 In the Supreme Court of the Territory of Utah. June Term, 1885.

THE UNITED STATES OF AMERICA, Respondent,

vs.

ANGUS M. CANNON, Appellant.

BOREMAN, Justice, delivered the opinion of the court:

On the 7th day of February, 1885, the defendant, Angus M. Cannon, was indicted in the third district court for the crime of unlawful cohabition. After trial and a verdict of guilty, he made his motion for a new trial, which was overruled, and thereupon, on the 7th day of May, 1885, he was sentenced to the penitentiary for six months and to pay a fine of $500. From the order overruling the motion for a new trial, and from the final judgment, the defendant has appealed to this court. The body of the indictment reads as follows:

"The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Angus M. Cannon, late of said district, in the Territory aforesaid, to-wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days, and continuously between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon, and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same."

The appellant claims that the indictment is insufficient and that it was error to admit evidence under it. He relies upon two alleged defects in the indictment:

First. That it fails to allege or show that the defendant is a "male person."

The action is based upon the third section of "An act to amend section 5352 of the Revised Statutes in reference to bigamy, and for other purposes," approved March 22, 1882, and commonly known as the "Edmunds Act." The section referred to provides that "if any male person in a Territory * * * shall hereafter cohabit with more than one woman he shall be deemed guilty of a misdemeanor," etc.

The name Angus is, in this community, recognized as that of a "male person," the defendant himself, however, being the most public character bearing the name. Outside of this community it is well recognized as a male appellative.

The word person embraces all mankind, and mankind is divided into two classes, one male and the other female. The statute says

that this crime can be committed only by the members of one class, the male, upon and with members of the other class, the female. When, therefore, as in the case under consideration, the specific crime is charged to have been committed by some person upon and with those of the female class, the natural and inevitable conclusion would seem to be that the "some person" committing the offense belonged to the other, the male class. The law would presume this, and its statement in the indictment would be unnecessary. Crim. Prac. Act, § 159. Laws of Utah, 1878, p. 94.

The grand jury could not have intended to indict a female under such a statute. To have done so would have been not only irregular, but in violation of their oath. The court cannot, in the absence of evidence, assume that the grand jury committed so great a folly and performed so vain a work. All presumptions are in favor of the regularity of the proceedings. People *vs.* Mills, 17 Cal., 276; 1 Whart. Cr. Law, § 713; 2 Russ. on Crimes, p. 732.

This is not the case of an indictment where there are different classes or kinds of persons who can commit the offense. That was the particular feature of the case of the People *vs.* Allen (5 Denio, 79) cited by the defense. In such a case it would be clearly necessary to specify in the indictment the class he was charged with belonging to, for the reason that there were two classes. In the case before us, however, there could be no doubt as to the class, as there is but one class. But in the case of the People *vs.* Allen the title, clerk, or servant was not so much a description of the person as it was an element in the description of the offense itself. It was a case of embezzlement, where the money had to be received by him as the clerk or servant, and in the course of his employment as such. In the case at bar, however, the word "male" can hardly be said to be an element in the description of the offense; it is simply a designation of the class of the offender. This designation of the defendant could in no way aid in establishing his identity. That was fixed by the name, which, upon arraignment, he admitted to be correct.

In some of the States, such as New York, Massachusetts, Pennsylvania, etc., the statutes against rape say that "whosoever ravishes and carnally knows a female," etc. (Mass. Stat., 1871, chap. 59), or "every person who shall have carnal knowledge of any woman," etc. (2 N. Y. Rev. Stat., 663, sec. 23), "is guilty of rape." The words "male person" do not appear in the statute; yet it is a well-known fact that no one but a "male person" could be indicted for such an offense. In a prosecution under such a statute the court is required to presume, from the very nature of the offense itself, not only that the defendant named therein is a "male person," but it would of necessity have to go one remove farther, and presume the words to be in the statute; that is, that the statute, although it did not say so, meant to apply to "male persons" alone. How much stronger is the case before us, where the statute is express and the court has to presume only as to the indictment. We think
32 it is a settled general doctrine that in rape cases, even under

the strict rules of the common law, it is not necessary to aver in the indictment the sex of the defendant.

2 Whart. Cr. L., sec. 1154.
2 Bishop's Cr. Proc., sec. 901 (ed. of 1846).
People *vs.* Colton, 2 Utah, 457.

In the cases like the one under consideration it is generally unnecessary to aver the sex in the indictment.

Bishop St. Crimes, secs. 700, 705–6–7.

A case there referred to was where the indictment charged "that Daniel McLeod and Delany Waters *alias* Lany Waters did live together in a state of adultery and fornication." The name Daniel is a well known male appellation, but "Delany" or "Lany" would seem to be as well suited to male as to female persons; yet in that case the court held that it was not necessary in the indictment to state the sex. McLeod *vs.* The State, 35 Ala., 395.

The same rule that would apply to rape, adultery, and lascivious cohabitation cases would apply to other classes of cases in regard to other words. For example, the statutes against murder say that murder is the unlawful killing of a human being with malice aforethought; yet in an indictment for murder it is not deemed necessary to allege that the victim was a human being. 27 Col., 507. In every such case it is conclusively presumed that the deceased was a human being, as there is no such crime as the murder of an animal or of an inanimate thing. And further, the statute does not say, in express words, that the unlawful killing must be the work of a human being in order to constitute a crime; yet the courts, from the very nature of the offense, do so hold. Not only so, but they go further and presume the defendant, who is charged with the crime, to be a human being of a particular class, namely, one of responsible age and of sound mind.

A California statute says that "any person of the age of fourteen years and upwards who shall have carnal knowledge of any female child under the age of ten years," etc., "shall be guilty of the crime of rape." The supreme court of that State holds that in an indictment under that provision it is not necessary to aver that the defendant is over fourteen years of age; that the defendant's capacity to commit the crime is an element in the crime. People *vs.* Ah Yek, 29 Cal., 575, citing Com. *vs.* Scannel, 11 Cush., 548. So if in the case before us it should be considered that the defendant's capacity to commit the crime be an element in it, yet it is not necessary to state in the indictment that he is a "male person." But, as stated above, we do not consider the words "male person" any element in the description of the crime. It would show that he belonged to the class which alone was capable, but it would not show that he individually was capable, or that he was not of irresponsible age, or not of unsound mind.

The cases of *ex parte* Hedley (31 Cal., 108) and the Com. *vs.* Libbey (11 Met., 64), referred to by the defense on this point, do not seem applicable. They were both cases of embezzlement, and no

question was raised as to the sufficiency of the indictment in either case.

We do not see wherein the insertion of the words "male person" would have aided the defendant in his defense. He could not thereby have been enabled to make any other or different defense than he has made. It would not have enabled him to understand any better the nature of the crime charged. If he has not been prejudiced in respect to his substantial rights he cannot complain.

Crim. Proc. Act, §479.
Laws 1870, p. 165.
Amended Laws 1884, p. 126.

We conclude, therefore, that it was not necessary to designate the defendant, in the indictment, by the words "male person." The fact, however, that he is a "male person" does appear from the indictment, taking it altogether, including the context, the nature of the offense and the recognized application of the name to male person.

Second. It is claimed that the indictment is defective in not alleging that the defendant put forth any pretense of marital relation to the woman mentioned. The appellant holds that the court has no right to interpolate words into the statute which the law-making power never intended to be there. That proposition as a general rule is undoubtedly true. But in the case in hand there is no interpolation. The question is on the indictment and it shows no interpolation, but if it exists it is in the interpolation of the words used in the statute and in the indictment. It is insisted that if the court construes the third section above specified as being confined to matrimonial cohabition it is wrong; but that if it is right then the indictment is defective in not alleging that defendant cohabited with these women as wives. So far as the objection to the indictment goes, it is not a question as to whether it is defective if some peculiar construction be adopted, but whether it is defective in law without any conditions. If it be assumed that the words "as wives," according to the suggestion in one of the briefs of appellant, were added in the indictment, would the alleged defect be cured? Exactly the same objection would arise as now arises without the addition of those words. The question would still remain, what is the meaning of the words "to live or dwell together as husband and wife?" The trouble, therefore, would not be ended if the suggestion of appellant were complied with. The addition of such words to that already in the indictment would be mere tautology, and would give the appellant no information as to the character of the charge against him that is not found in the indictment as it now stands. From the position taken afterwards in the briefs of the appellant, although the point is not made against the indictment, it is
33 apparent that appellant holds that still other additions should be made to the description of the offense in the indictment. But as such particularity would not be required even in a murder case, we do not think it would be required in a case of misdemeanor. It is never necessary to detail in an indictment all the facts which the

prosecution expect to prove in order to make out a case, nor is the defendant ever entitled to them. He is entitled to a plain and concise statement or description of the offense charged against him in order to be enabled to make his proper defense and to enable him to plead a conviction thereunder in bar of another prosecution for the same offense.

In the construction of penal statutes care must be taken not to put such a construction upon the language as would include the innocent as well as the guilty. The evil to be guarded against must be kept in view. Com. *vs.* Stout, 7 B. Mon., 249.

We will not likely go astray if, with this rule always before us, we keep in remembrance that other indispensable rule, namely, that the intention of the Legislature must be sought and followed, except that the construction must not be repugnant to the clear meaning of the words used.

With these rules to guide, the cases cited by appellant under this second heading are clearly not inconsistent with our views of the proper construction to be put upon the statute under consideration. The only object of those references is to show that the indictment should have added the words "as wives" to the word "cohabit," and this we have shown would have availed nothing.

The offense with which the defendant is charged is purely statutory, and it is a new offense in our statutes. It is a general rule, well settled, that in an indictment for an offense created by statute it is sufficient to describe the offense in the language of the statute:

People *vs.* Colton, 2 Utah.
People *vs.* Cronin, 34 Cal., 191.
Lodano *vs.* State, 25 Ala., 64.
People *vs.* Murray A. West—C. R. 643, California case.
People *vs.* Soto, 63 Cal., 165.

The Supreme Court of the United States says that where a person is indicted for a purely statutory offense it is sufficient in the indictment to charge the defendant with acts coming within the statutory description in the substantial words of the statute, without further expansion.

U. S. *vs.* Simmons, 96 U. S., 360.

Where a new offense has been created by statute, without reference to anything else, it will be sufficient to describe the offense in the terms of the act.

People *vs.* Saviers, 14 Cal., 29.
People *vs.* Shaber, 32 Cal., 38.

To the general rule of describing statutory offenses in the language of the statute there are exceptions, the principle ones being (1) when the statute makes that an offense which was an offense at the common law, and (2) when the offense is described in the statute in terms too general. The cases cited by the appellant come within the one or the other of these exceptions. As we have shown above, the indictment in the present case would have been no more certain and plain than it is, even if the definition of the word co-

habit had been embraced therein. The word has an established meaning, and the indictment gives such particulars of time, place, and names of the women as to inform defendant wherein he was charged with having violated the law. If the case falls within either of the exceptions to the general rule, and would require more particularity, it has not been shown. It was the duty of the appellant to have done this.

State *vs.* Abbot, 31 N. H., 434.
1 Whart. Crim. Law, sec. 364.

The alleged offense is not claimed to have been an offense at common law, therefore it does not fall within the first of these exceptions, and it does not fall within the second exception unless the description is language too general to give the defendant information to which he is entitled to enable him to prepare his defense, or to plead the judgment hereafter in bar of another prosecution for the same offense or too general to guide the court in passing sentence. If the indictment had charged the defendant with "cohabiting with more than one woman," without giving the names of the women, or without time and place, it would have been insufficient in not giving particulars so as to enable defendant to make proper defense or to plead the judgment hereafter.

In the exposition of a statute the intention of the Legislature is to be sought and followed, unless by doing so the construction to be given is repugnant to the clear meaning of the words, and if the meaning of the words is plain and obvious the only safe course is to suppose the Legislature intended those things which the words denote. Taylor *vs.* Leoni, 20 Mich., 155. If the language is clear, it is conclusive and the words must not be narrowed down to the exclusion of what the Legislature intended to embrace, but the intention must be gathered from the words. That sense of the words should be adopted which best harmonizes with the context and promotes in the fullest manner the policy and objects of the Legislature.

U. S. *vs.* Hartwell, 6 Wall., 385.

What, then, was the object of the Congress in enacting this statute? It was, judging from the whole act, intended to be an aid in breaking up polygamy and the pretense thereof. The well-recognized difficulty of reaching the polygamy cases by reason of having to prove marriage and by reason of the fact that the statute of limitations bars prosecutions after three years no doubt led Congress to pass this act. It was sought to break up the polygamic relation. It was necessary in effect to make polygamy a continuous offense without requiring proof of marriage. Whether marriage took place or not the pretense of marriage—the living, to all intents and purposes, so far as the public could see, as husband and wife—a holding out of that relationship to the world were the evils sought to be eradicated. Although aimed primarily at such a relationship, it reaches out and embraces all men living and dwelling with more
34 than one woman as if they were married, whether any marriage had ever taken place or not. It was living and dwelling together under the appearance of being married. The appel-

lant insists that cohabitation necessarily includes sexual intercourse, and that there can be no cohabitation without it. We find nothing whatever in the language or context to lead us to believe that Congress meant to apply the statute to lewd and lascivious cohabitation, which would be the case if the construction contended for by the appellant were correct.

The primary meaning of cohabit is to dwell with (*con*, with, and *habere*, to dwell), and at the present day it is generally held to mean to dwell or live together as husband and wife, or to dwell or live together in the same company, place, or country.

Calef *vs.* Calef, 54 Me., 365.
Com. *vs.* Calef, 10 Mass., 159.
Ohio *vs.* Connoway, Tappan (Ohio), p. 90.

This meaning is recognized in appellant's brief (p. 4), where it says that "in looking to the common signification of the word cohabit we find but two meanings, one broad and generic, and including all residents of the same ward, town, city, or even country, and the other the living together as husband and wife." The brief proceeds to place the construction upon the latter words, which we have here referred to, and which we do not think are warranted.

That learned author, Mr. Bishop, says that he knows of no legal authority or usage that would embrace sexual intercourse in the word cohabitation, except the casual misapprehension of Chancellor Walworth in Dunn *vs.* Dunn, 4 Paige, 425, 428.

1 Bishop's M. & D., § 777, note (1), 4th Edition.

The authorities of the appellant on this point do not shake the position that cohabitation does not include sexual intercourse. The word does not even include necessarily the occupying the same bed.

2 Paige, Ch. R., 425.

In Foster *vs.* Foster (1 Hag., 144), where matrimonal intercourse was sought to be enforced between man and wife, the court drew the distinction between "matrimonal intercourse" and "matrimonal cohabitation," holding that "the duty of matrimonial intercourse 'could not be compelled,' but that 'matrimonal cohabitation' could be."

The case of Orme *vs.* Orme (2 Eng. Ec., 354) was brought by the wife against her husband for restitution of conjugal rights. The libel admitted that the complainant was "allowed by the said Robert Orme to reside in the same house with him," and the court held that this admission of "cohabitation" admitted the complainant out of court, and that she might have been restored to cohabitation, yet as that was admitted to exist, and the court could go no further; that the court had no power to restore the complainant to matrimonial intercourse with her husband.

Had it been the intention of Congress to include the common sexual vices in this provision, it appears unreasonable that it should not have said so. It evidently did not intend to include lewd or lascivious cohabitation; for had it so intended it would have added those words. When the bill was under consideration in Congress,

their attention was specially called to the matter, and it could not, therefore, have been an oversight. A member (Mr. Singleton) offered an amendment, whereby it was proposed to reach all of the sexual vices, and to punish adultery, fornication, open and notorious lewdness, etc.; but the amendment was voted down.

Congressional Record, March 15th, 1882.

Thus Congress clearly gave expression to their view that no such offenses were to be embraced in the act. The crimes which Congress proposed to punish were such as a large part of the people, especially in this Territory, were upholding and practicing. The other vices were such as all people disapprove, and hence Congress left their suppression to the local authorities. The interpretation we have given to this provision—the 3rd section—is, as we think, the one best calculated to effect the object intended by Congress and to suppress the evil.

35 Hence, independent of the Statutes of this Territory governing pleadings in criminal cases, we think the indictment is sufficient; that it was not necessary to have added the words "as wives" to the description of the offence as set out in the indictment, nor to have given any particulars of the facts necessary to be proved beyond what were given, and especially that it was not necessary to have alleged anything in regard to sexual intercourse.

We have, however, a criminal proceedure act in this Territory which governs the mode and manner of criminal pleading, and we now come to consider that act, and see what effect it has upon the matters necessary to be stated in the indictment.

36 The criminal procedure act of this Territory is to the criminal practice what the civil procedure act is to the civil practice.

27 Cal., 507.

As we are bound by the criminal procedure act it is unnecessary to inquire what was the rule at common law when the statute speaks.

People *vs.* West, 49 Cal., a. 10.
People *vs.* Murphy, 39 Cal., 52.
People *vs.* Cronin, 34 Cal., 191.

The criminal procedure act says:

"All forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this act."

Utah Laws, 1878, p. 91.

If the indictment will stand the test of these rules it will be sufficient, no matter how much it might fall short of what would have been necessary at common law.

People *vs.* King, 27 Cal., 510.
People *vs.* Dick, 37 Cal., 277.
People *vs.* Cronin, 34 Cal., 191.
People *vs.* Murphy, 39 Cal., 52.

In section 150 of the criminal procedure act it is provided what the indictment must contain. After specifying that it must give the names of court and parties, it says that the indictment must contain "a clear and concise statement of the acts or omissions constituting the offense, with such particularities of the time, place, person and property as will enable the defendant to understand distinctly the character of the offense complained of and answer the indictment." A form of indictment is given, and section 151 provides that the indictment must be direct and certain as it regards, (1), the party charged, (2,) the offense charged, and, (3,) the particular circumstances of the offense.

Sec. 158 specifies that the indictment will be held good if it can be understood from it (amongst other things not here brought in question), so far as the description of the offense goes, "that the act of omission charged as the offense is clearly and distinctly set forth without repetition, and in such manner as to enable the court to understand what is intended, and to pronounce judgment upon a conviction, according to the right of the case."

To have enabled the defendant to answer the indictment it could not have been necessary that he should have been apprised of the fact by express averment that he was a male person, nor could it have been necessary, as we have seen, to make him to understand the character of the offense charged and to answer it, that the offense should have been otherwise, or more particularly described, than has been done. The offense is clearly and distinctly set forth; there is no repetition, and it is set out in a manner sufficient to enable the defendant and the court to understand it, and to guide the court in pronouncing judgment.

If appellant thought the indictment defective in either respect he should have demurred. Cr. Proc. Act, sec. 192, Laws of Utah, 1878, p. 101. The defects were such as could have been reached by demurrer. As appellant did not demur, he waived his objections. Sec. 200 of Cr. Pro. Act; People *vs.* Swenson, 49 Cal., 388. By said section 200 it is provided that all objections mentioned in section 192, authorizing demurrer, if they appear on the face of the indictment, can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject-matter of the indictment and the objection that the facts stated do not constitute a public offense can be taken at the trial under the plea of not guilty, or after trial in arrest of judgment. The objections urged are such as appear on the face of the indictment, and neither objection goes to the jurisdiction of the court. If, then, the indictment alleges facts sufficient to constitute a public offense, it is sufficient; and there is no remaining objection to the indictment that the appellant can raise after having failed to demur. We have already seen that a public offense was clearly and concisely stated.

The appellant, however, raised the objections at the trial, claiming that the indictment was too defective to allow of the admission of any testimony under it. Yet, from what we have said, it plainly appears that there were no grounds for the objections, and that, if there were, they had been waived.

We are brought now to the consideration of the alleged errors in excluding testimony offered by the defense. Several questions were by the defense asked a witness for the prosecution which were objected to by the prosecution as irrelevant, immaterial, and incompetent. The avowed object of these questions, as stated by the defense, was to show or tend to show non-access during the time charged, and as tending to disprove any presumption of sexual intercourse which might be raised by the testimony of the witness. The objections were sustained. The defense made an offer of proofs, the gist of which was to the same effect. Part of the offer was wholly hearsay—where he sought to show what was told the woman; a large part was wholly made up of admissions, and the residue bore upon the question of sexual intercourse and occupying the same bed. We have already seen in this opinion that sexual intercourse was not a necessary element in the crime. If it were an element, a necessary element, as the defense claim, then the prosecution might have shown that the defendant and these women lived together in the same house and company; that they were continually walking, talking, and eating as if husband and wife, treating each other so before their neighbors and the public generally, calling each other husband and wife, respectively, having all their dealings before the world as husband and wife. He might be providing for all her wants of clothing, food, house and household affairs, and claim the women as his wives, and doing many more like things; and yet if the prosecution did not prove that defendant had sexual inter-
37 course with these women, the prosecution would have to fail. The prosecution would have to prove adultery when adultery was not charged, would have to prove fornication and lewd and lascivious cohabitation, when none of these charges had been made, and all such offenses had been purposely left out of the act by the law-making power. It seems to us preposterous that Congress could ever have intended such a thing when the law was enacted. Congress never could have intended to include those things which it purposely excluded. If the sexual intercourse and bedding together were not parts of the offense necessarily, what advantage could it be to a defendant to disprove the existence of such things, especially when it would be the duty of the court—and it was done in this case—to instruct the jury that sexual intercourse and bedding together were not necessary parts of the offense. What is the advantage of introducing in evidence facts which immediately thereafter the court will have to rule out or declare of no importance. We do not think that the defendant could in any way be harmed by the rejection of such evidence. Its admission would not disprove nor tend to disprove any testimony by the prosecution. It would only tend to disprove that which the court correctly instructed the jury was not important.

The appellant urges as error the refusal of the court to give instructions asked by him. There were twenty-four such instructions, between many of which there was but a shade of difference. The first and second of these instructions have affirmed the existence of

the Edmunds act and its applicability to this Territory. They were wholly immaterial and irrelevant.

The rejection could in no way have affected the result. The jury take the law from the court, and it is not their province to know or to be informed where the court obtained the law.

The 3d instruction—having reference to the non-applicability of the act to persons cohabiting with lawful wives—has no application to evidence in the case.

The 4th, 5th, 6th, 7th, 8th, 9th, 11th, 18th, and 21st have direct reference to sexual intercourse, and are wholly outside of the case and not applicable.

The 13th is misleading—it has reference to fathers not being compelled to break off all communications with the mothers and the children. It would indirectly lead the jury to believe that the acts of the defendant in regard to the women were perfectly justifiable.

No. 14, 15, 16, and 17 have reference to the evidence of the relationship existing between the defendant and the women at and prior to the passage of the Edmunds act, and indirectly raise the question as to the competency of such evidence.

In California a man was being tried for the alleged murder of his wife. A witness, upon being questioned, said that about a month before the homicide the deceased wife came to her house greatly excited, and after she came the defendant in the case had been heard swearing and breaking doors, windows, and other things in his own house, and that this was going on for some time. The defense objected to the testimony, but it was admitted, the court holding the admission proper, and that these circumstances, although occurring some time before the homicide, were proper for the consideration of the jury. That these facts tended to show the feeling of the defendant toward his wife and his treatment of her, although this was before the homicide, and in some degree they tended to show a motive for taking the life of the wife.

38

People *vs.* Kern, 61 Cal., 214.

The case of Badger *vs.* Badger, referred to by the defense upon another point, recognizes the doctrine that a meritorious intercourse in the beginning is presumed to continue unless there be evidence of a change. 88 N. Y., 546; Thayer *vs.* Thayer, 101 Mass., 111. The principle of these cases applies to the case under consideration.

The evidence of what occurred prior to the date alleged in the indictment, and prior to the passage of the law, was proper for the consideration of the jury, and the jury were, notwithstanding, instructed that they must presume the defendant to be innocent until the contrary be shown. It is not proper nor necessary (although it is sometimes done when no objection is offered) to tell the jury specially that they were at a particular time, and before the time alleged in the indictment, to presume him innocent, but the charge of the court covers all time down to the closing of the case by verdict. Such charge of court could not have misled the jury, for they find the defendant guilty as charged, and he is charged with an offense between certain dates. The rejected instructions could have

done the defendant no good; their rejection certainly did him no harm. It is no doubt error to refuse to give an instruction asked, and which is material and has not been given in or covered by the charge; but it is not error to refuse immaterial requests.

People *vs.* King, 27 Cal., 507.
People *vs.* Kelly, 28 Cal., 423.
People *vs.* Story, 30 Cal., 151.
People *vs.* Lachanais, 32 Cal., 433.
People *vs.* Ah Kong, 49 Cal., 6.

The 10th instruction asked by the defense and refused has reference to what rule the court should adopt in the interpretation of the statute. It might properly be addressed to the court, but it was a matter with which the jury had nothing to do.

The 12th instruction, refused, had reference to the legitimatising of polygamous children. It was wholly irrelevant and immaterial.

The 22d, 23d, and 24th instructions, refused, have reference to the necessity of showing marriage or marriage ceremony. No ceremony of marriage is necessary to be shown in this class of cases. The instructions were therefore irrelevant and immaterial.

The 20th, refused, instruction, relating to the holding out of Clara C. Cannon as wife, is covered by the charge given.

In some of the instructions refused there may have been isolated sentences that were proper, but we think that in every such instance it is covered by the charge.

The next error assigned is the giving of the instructions by the court, as embraced in the charge.

39 The court gave the time within which the offense was charged to have been committed, and stated what the offense was, and then detailed in general terms classes of circumstances which would, if proven, make out such a case as would authorize the jury to find defendant guilty. The court charged upon the question, the most vital in the whole case, the question of sexual intercourse, and correctly so charged, and the court reminded the jury of the presumed innocence of the defendant, and that they were the judges of the credibility of the witnesses, etc. We cannot see wherein the court has failed to cover the whole case in the charge. If there be any errors at all, they are unimportant, and for such errors courts will not reverse.

People *vs.* Varman, 53 Cal., 630.

The charge must be taken as a whole, and if it fairly and correctly presents the law bearing upon the issues, the appellate court will not disturb the judgment.

People *vs.* Hortado, 63 Cal., 288.
People *vs.* Welch, 49 Cal., 174.

It is on the defendant's motion for new trial urged that the verdict should have been set aside because one Johnson, a juror, was a bigamist. The affidavits as to incompetency are not embraced in the bill of exceptions, and hence are not properly before us.

People *vs.* Stonecifer, 6 Cal., 405.

But if they were, the verdict could not be set aside.
People *vs.* Lewis, 5 Pac. Coast R., No 9, p. 543.
Sec. 188, Laws of Utah, 1878.

For the reasons stated throughout this opinion, it is apparent that the overruling of the motion for a new trial was proper, and the judgment was correct.

The order and judgment of the court below are affirmed.

Zane, C. J., concurs.

Powers, J., concurs in the result, and files his opinion on the case.

40 In the Supreme Court of the Territory of Utah.

THE UNITED STATES, Respondent,
vs.
ANGUS M. CANNON, Appellant.

Opinion by POWERS, *J.*:

Although I agree with the majority of the Court in the construction of the word "cohabit" as used in the "Edmund's act," so called, and also in the result reached, I am unable to concur in the conclusion that there is no error in the record, and I have therefore deemed it proper to express my views as to the whole case.

The indictment charged that the defendant, "Angus M. Cannon, late of said district (the third), in the Territory aforesaid, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and eighty-two, and on divers other days and continuously between the first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the United States in such case made and provided, and against the peace and dignity of the same."

The main controversy arises over the construction of the word "cohabit." The prosecution contend that it means to dwell together as husband and wife, that it does not necessarily include intercourse between the sexes, and that the law clearly distinguishes "matrimonial cohabitation" from "matrimonial intercourse."

Upon the part of the defendant it is contended that all cohabitation which the law deals with is sexual cohabitation. That the word, as used, means a dwelling together by male and female, adult persons, in the intimacy of husband and wife, and that sexual intercourse is necessarily implied.

Eminent counsel have argued the case with marked ability, and its importance, not only to the defendant, but also to the people, demands that it should receive the most careful consideration of this court.

I. In order to correctly understand what is meant by the statute when it says, "if any male person in a Territory * * * hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor," let us endeavor to ascertain what was the object that

Congress had in view in the passage of the act, what was the evil it sought to remedy and what was the mischief it aimed to suppress.

If we consider the evident purpose of the "Edmund's act," and view it in the light of the exigency which caused its enactment, the conclusion seems inevitable that its purpose and intent is to protect monogamic marriage. It does not appear that its aim is to punish mere sexual crimes. This seems to have been the view taken by Congress. See Congressional Record, March 15, 1882, p. 34, but, however that may be, it seems to be the view that is supported by reason and authority.

Marriage, as understood in Christendom, means the "voluntary union of one man and one woman, to the exclusion of others." The term, therefore, is not correctly applied to the union of one man with more than one woman. Story on Conflict of Laws, 8th Ed. 184, note. It is the parent and not the child of society, for it is the very basis of the whole fabric of civilized society. Story on Conflict of Laws, 185. It is something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts. Story, 185. No legislation can be supposed, more wholesome and necessary, in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it upon the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. Murphy *vs.* Ramsey, 114 U. S., 45. Marriage is the foundation of the home and upon it is builded the entire superstructure of society. It finds its defense in every human heart, which jealously guards the one object of its affection. It is the outgrowth of progress and enlightenment, for it recognizes that the wife and mother is the equal of the husband and father.

There is far more to the marriage relation than the mere gratification of passion, or the procreation of children. The wife, taking her place by her husband's side, his equal, his counselor, his friend, makes him a perfect man. Together they share the sorrows of life; together they enjoy its blessings. When each is true to the other they present a union not made by man, and as they pass along life's pathway, their very example is of infinite benefit to mankind. Anything which tends bring this relation into disrepute is an injury to the world. Anything which lowers the popular appreciation of the relation and destroys the good that marriage does the world by mere example, is an evil which the law should correct.

Society with all its ramifications being founded upon marriage, it is upon grounds of public policy that it is regulated and protected. When the act in question was passed, Congress was aware that in some of the Territories there are people who believe that it is right for a man to take and live with more than one wife. That there are

men who not only marry more than one woman, but who say to the world by conduct and by words, that two or more women with whom they are living are their wives. The law-making power saw that the mere fact of a plural marriage is an evil example. That the living and associating with two or more women as if married to all tends to weaken the popular appreciation of true marriage,
41 and thus is detrimental to society. Therefore, for the purpose of protecting the marriage relation, the law under discussion was passed. It is directly aimed at the suppression of polygamy and the polygamous household as an evil example, dangerous in its tendency to the family relation as recognized by this nation. It was not the offense against chastity merely, but the offense against the family, which Congress intended to suppress. To accomplish its object the law has several provisions. It provides for the punishment of offenders by the courts, and by restricting their political privileges. It will be necessary to refer to two or three of its sections.

"SEC. 1. Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage, whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, on the ground of nullity of the marriage contract."

Under this section "the crime of bigamy or polygamy consists in entering into a bigamous or polygamous marriage. Continuing to live in that state afterwards is not an offense, although," as we shall see later on, "cohabitation with more than one woman is." Murphy *vs.* Ramsey, 114 U. S., 42, 43. As will be seen from the construction placed upon this section by the Supreme Court of the United States, and quoted above, it is the fact of marriage with two or more persons that constitutes the offense. It is plain that the first section of the act deals simply with the marriage relation. This section does not punish offenders for cohabitation or sexual intercourse, but for entering into a bigamous or polygamous marriage. *Ibid.* Proof of the marriage is all that is essential.

The third section of the act reads as follows:

"SEC. 3. That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not

more than six months, or by both said punishments in the discretion of the court."

When these two sections are read together they seem plain. One makes the fact of marriage an offense, without reference to cohabitation or sexual intercourse. The other makes unlawful the cohabitation, or appearance of marriage. Previous to the act becoming a law many had contracted bigamous or polygamous marriages, and were living with their wives. The object of the third section obviously, is to put an end to polygamous establishments. It was designed to meet cases which the first section could not. Many prosecutions for polygamy might be barred by the lapse of three years by §1,044, of the Revised Statutes of the United States, and yet a man might be living with more than one woman as a husband lives with his wife, and by his example be doing the public positive injury. The fact whether he does or not have sexual intercourse with the woman with whom he is associating as a husband associates with his wife, is a matter of but little moment when compared with the greater wrong done to society.

Another section of the statute I quote:

"SEC. 7. That the issue of bigamous or polygamous marriages, known as Mormon marriages, in cases in which such marriages have been solemnized according to the ceremonies of the Mormon sect, in any Territory of the United States, and such issue shall have been born before the first day of January, anno Domini eighteen hundred and eighty-three, are hereby legitimated."

Thus, by these provisions, Congress says in substance, there must be no more plural marriages. The children born or begotten at the time of the passage of the act are legitimate, but hereafter they are illegitimate; and no male person can live with more than one woman as his wife. It would seem that the word "cohabit" implies or means no more than the outward appearance of living with two or more women as a husband lives with his wife.

If this is so, then the prosecution, in order to make out a case, are not required to satisfy the jury that the parties indulge in sexual intercourse. Neither would it be a defense for a man accused of unlawful cohabitation to prove that he did not indulge in sexual intercourse with the women whom he held out to the world as his wives, or, in other words, with whom he cohabits.

II. The defendant claims that there are two defects in the indictment.

1. That it fails to show that the defendant is a "male person."

2. The indictment does not allege that the defendant put forth any pretense of marital relation to the women therein mentioned.

I agree with my brethren that the indictment is sufficient. The sex is sufficiently shown, if that is necessary, by the name Angus. I think it would not mislead the defendant, and it is not claimed that he is not the man named. The precise words of a statute need not be followed in order to make an indictment valid.

42 The indictment follows the language of the act in describing the offense. This seems to be sufficient, particularly in statutory misdemeanors, and it may be laid down as a general rule,

to which there are few exceptions. State *vs.* Rust, 35 N. H., 438; U. S. *vs.* Mills, 7 Pet., 138 (432); U. S. *vs.* Gooding, 12 Wheat., 460 (281); 1 Wharton Cr. Law, § 364; Romp *vs.* State, 3 Green, Iowa, 276; Chambers *vs.* People, 4 Scam., 451; State *vs.* Regan, 22 Mo., 459; State *vs.* Mitchell, 6 Mo., 147; Simmons *vs.* State, 12 Mo., 268; Whiting *vs.* State, 14 Conn., 487; People *vs.* Colton, 2 Utah, 457; People *vs.* Thompson, 4 Cal., 238; People *vs.* Savier, 14 Cal., 29; People *vs.* Martin, 32 Cal., 91; People *vs.* Cronin, 34 Cal., 191, 208. Besides, the defendant failed to demur specially, and if there was any defect it was waived. Crim. Prac. Act, § 200. But there does not appear to be any defect, as the indictment clearly meets the requirements of the criminal practice act. See Cr. Prac. Act. § 158.

III. On the trial Clara C. Cannon was sworn as a witness for the prosecution. She testified as follows: "I know the defendant. I have been his wife. I was married to him about ten years ago and have since lived at 246 First South street, Salt Lake City. I live there now, and have lived in the same house since shortly after I was married. The defendant has lived in the same house part of the time and in the same house during the past three years. I have one living child, which was the child of that marriage, born January 11th, 1882. I have had two other children by that marriage, both born before the living one. In this house I occupied two rooms on the ground floor, a parlor and a dining-room, on the east side. My kitchen is back, not attached to my part of the house. I have occupied this part of the ground floor since I first went to live in the house. There is a hall running through the house on the ground floor, and the rooms I occupy on that floor are on the east side of the hall. I know Amanda C. Cannon. She has lived in the same house I live in during the past three years. She has occupied, on the ground floor, two rooms on the west side of the hall, besides her kitchen, which is attached to the back of the main building, and is not the kitchen I use. I suppose Amanda Cannon is defendant's wife. I have heard him speak of her as his wife, as Mrs. Cannon, and she has lived in the same house ever since I went to live there. She has nine children, I think. During the past three years, I think all her children have been living there at home, but not all the time. My child lives with me in my part of the house—I mean the child of this marriage. The children of Amanda Cannon live with her in her part of the house. During the past three years, and prior to the month of February, in this year, the defendant has been in the habit of taking his meals with me, in my part of the house, a portion of the time—about one-third of the time. There were stated intervals; he took his meals with me every third day—with me and my children. I have a son and daughter grown up and two orphan children. He took his meals with me and the child of this marriage and the other children every third day. He took his meals with Amanda Cannon and her family one-third of the time. He took all three of his meals with me every third day—on week days and on Sunday morning he had breakfast at my house—that is, he took his meals with me two days of each week, and also his breakfast Sunday morning, which made

one-third of the time. On Sunday he took his dinner at Sarah's and his supper at Amanda's. There are four rooms on the second floor of the house, used as bed-rooms, and a hall, with two of the rooms on either side of it. The rooms open into the hall. During the past three years I have occupied the bed-room in the northeast corner and Amanda has occupied the one in the southwest corner of the house. The defendant has occupied the bed-room in the southeast corner. The room occupied by me as a bed-room and the one occupied by defendant as a bed-room are on the same side of the hall, and there is no intervening room."

On cross-examination the witness was asked by counsel for defendant several questions, the purpose being, as stated, as "tending to show, with other evidence to be given, non-access during the time charged in the indictment, and as tending to disprove any presumption of sexual intercourse which might be raised by the testimony of the witness."

The prosecution objected to each question on the ground that it was immaterial, irrelevant, and incompetent.

The court sustained the objection, and defendant excepted.

I think there can be no question but what this testimony was admissible. True, the fact that the defendant did not have intercourse with these women would not be a defense, but, in view of the evidence elicited by the prosecution, it became proper. The court in his charge could have instructed the jury as to the weight to be given to this evidence. We must remember that these questions were asked in cross-examination, and that great latitude is allowed. We must bear in mind, also, that the prosecution had shown on the direct examination that the defendant occupied a bed-room adjoining that of the witness, there being no intervening room. The evident purpose of the prosecution in eliciting this testimony was to enable the jury to infer that the parties enjoyed sexual intercourse. That is the natural inference that would be drawn from such testimony, and the defense were entitled to rebut it. That the prosecution understood that such an inference would be readily drawn is shown by their brief in the Musser case—a similar case to this, and argued at the same time. In that brief, speaking of the proof showing co-
43 habitation, it is said: "His (Musser's) bed-room is between the bed-chambers of the women, and open doors afford ready and easy access to the marriage beds." It is plain that the testimony is open to the inference that I have drawn from it.

On cross-examination, anything that will explain, modify, or cut down the testimony drawn out on the direct is proper. "A party always has the right to call out on cross-examination any facts within the knowledge of the witness which has a tendency to affect or qualify the evidence he has given in chief, whether it points to the same circumstances about which he testified or not. A more restricted rule renders cross-examination in many cases nearly valueless, and enables a party by careful questions to his witness to give to the jury a one-sided and partial view of the facts within the knowledge of the witness, and effectually to preclude the opposite party from supplementing the witness' statement with the further

facts within his knowledge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to vouch for him as credible, and has also a less privilege of searching examination." Det. & M. R. R. Co. *vs.* Van Steinberg, 17 Mich., 100.

IV. With regard to the charge of the court the error lies not so much in what the judge did say as in his failure to say what he ought. This case belongs to a class that creates great public interest. Men have strong prejudices and are prone to follow their prejudices, whether they are fully borne out by testimony or not. Therefore a court which should always be fair, always be calm, and no matter what the public may demand, should always mete out impartial and evenhanded justice, should carefully throw about a defendant the safeguards to which the law says he is entitled. The charge to the jury was remarkably brief. It was as follows:

"The indictment in this case charges that the defendant, on the first day of June, in the year of our Lord 1882, and on divers other days continuously between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. If you believe from the evidence, gentlemen of the jury, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.

"It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed, or slept in the same room; neither is it necessary that the evidence should show that within the time mentioned, he had sexual intercourse with either of them.

"I will state the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence, and of the fact; and, if you find the defendant guilty, you will say in your verdict, We, the jury, find the defendant guilty in manner and form as charged in the indictment; and if you find him not guilty you will say, We, the jury, find the defendant not guilty."

The foregoing comprises the entire charge from beginning to end.

The court should have informed the jury that this prosecution was brought under the provisions of the "Edmunds act," and they should have been informed when that act took effect. They should have been told that prior to the passage of that act cohabitation was not an offense. The word "cohabit" should have been defined, and the jury instructed that unless they found beyond a reasonable doubt that the defendant had cohabited with the women named in the indictment since the "Edmunds act" took effect, and within the time named in the indictment, they should acquit. The defendant requested instructions on all these points and they were refused. This refusal was error, for it is the duty of the judge, when requested, to

instruct the jury upon every point of law pertinent to the issues. People *vs.* Taylor, 36 Cal., 255; Hays *vs.* Paul, 51 Penn. St., 134. A party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake, and it is error to refuse to instruct, when requested, upon points pertinent to the issue. Muldouney *vs.* Ill. Cent. R. Co., 32 Iowa, 176; Carpenter *vs.* State, 43 Ind., 371; Morris *vs.* Platt, 32 Conn., 75; Nels *vs.* State, 2 Tex., 280.

As far as the evidence goes the judge should give any pertinent instructions asked for conformable to the law.

State *vs.* Wilson, 2 Scan., 225.
Davis *vs.* State, 10 Ga., 101.

He need not adopt the language of counsel asking the instruction, but, if the form and substance is not objectionable, it is better so to do.

Bish. Crim. Pro., S. 981.

Any explanation may be added or, of course, any modification of its terms may be made.

Lambeth *vs.* State, 23 Miss., 322.
Bish. Crim. Pro., S. 981, and cases cited.

It is true that the court charged the jury that "the law presumes the defendant innocent until proven guilty beyond a reasonable doubt," but the defendant was entitled to have them charged in the language of his fifteenth and sixteenth instructions, which were as follows:

"15. The law presumes innocence, and therefore that all persons who were cohabiting when the Edmunds law took effect contrary to the provisions of that act then ceased to do so."

"16. No fact in the conduct of the defendant subsequent to the passage of the Edmunds act can be made more significant of guilt in violating the section against cohabitation by reason of the
44 existence of the polygamous relation between him and the women mentioned in the indictment prior to the passage of the statute." A general abstract statement that the law presumes innocence is not equivalent to a specific instruction that the law presumes innocence in a particular predicament shown by the evidence.

So also the last half of the thirteenth request should have been given. That instruction was: "That all the defendant's social familiarity with the mothers of such families established prior to the passage of said act, not shown to include all the particulars of cohabitation, as the court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation would entitle the defendant to acquittal."

Evidence had been introduced of matters occurring prior to the passage of the law. The jury should, therefore, have been told that to find the defendant guilty they must find that he had cohabited with the women named within the time stated in the indictment. They were told that the defendant was charged with cohabiting with the women between certain days, but they were not told that they must

confine their investigation of his guilt or innocence to the proof of facts and circumstances occurring between those dates. On the contrary, they were at once informed that if they found beyond a reasonable doubt that the defendant lived in the same house with the women, ate at their tables, and held them out to the world as his wives, they should find him guilty. More restriction should have been placed upon the investigations of the jury, for no act done prior to the passage of the act can be made by that act the basis of a criminal charge; nor can subsequent legislation make a prior act conduce to a conviction, for it would then alter the situation of the defendant to his disadvantage.

Kring *vs.* Missouri, 107 U. S., 221.
U. S. *vs.* Hall, 2 Wash., 366.

I have pointed out the foregoing errors in order that they may be avoided in future trials of like nature. I think, however, that in the present case, they are errors without prejudice, for, after most mature and conscientious reflection, I am not convinced that they affected the result. All of the testimony taken upon the trial is brought up with the record. After carefully considering it in all its bearings I am persuaded that it clearly shows the defendant to be guilty, as charged in the indictment. I am convinced that the verdict of the jury would not have been different than it was, even had the errors not existed. I, therefore, concur in the conclusion of the court affirming the judgment of the court below.

ORLANDO W. POWERS.

45 TERRITORY OF UTAH, } *ss:*
Salt Lake County, }

I, Ezra T. Sprague, clerk of the supreme court of said Territory of Utah, do hereby certify that the annexed and foregoing is a full, true, and correct copy of the record, proceedings, and judgment in and of said court in the cause of the United States, respondent, *vs.* Angus M. Cannon, on file or of record at my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 16th day of July, A. D. 1885.

[Seal United States of America, Supreme Court, Territory of Utah.]

E. T. SPRAGUE, *Clerk.*

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, between Angus M. Cannon, appellant, and The United States, respondent, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 8th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Oct. 8, 1885.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM. T. MILLER,
Justice Sup. Court.

47 The United States of America to the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein Angus M. Cannon is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States, this eighth day of October, in the year of our Lord one thousand eight hundred and eighty-five.

SAM. F. MILLER,
Justice Sup. Court, U. S.

47½ A true copy of the within citation was personally served on me, at Salt Lake City, Utah, this fourteenth day of October, A. D. 1885.

W. H. DICKSON,
U. S. District Attorney for Utah.

48 Know all men by these presents that I, Franklin S. Richards, of Salt Lake City and county, Utah Territory, am held and firmly bound unto The United States in the full and just sum of five hundred dollars, to be paid to the said The United States, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this fourteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at a supreme court of the Territory of Utah, in a

suit depending in said court between Angus M. Cannon, appellant, and said United States, respondent, judgment was rendered against the said appellant, and the said appellant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said Angus M. Cannon shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered and presence of—
FRANKLIN S. RICHARDS. [SEAL.]

Approved by—
SAM. F. MILLER, *Justice, &c.*

[Endorsed:] Filed Oct. 14th, 1885. E. T. Sprague, clerk.

49 *Assignment of Errors.*

Supreme Court of Utah Territory.

THE UNITED STATES, Def't in Error,
vs.
ANGUS M. CANNON, Pl'ff in Error.

The appellant in said court, having prayed for a writ of error on the record herein, now assigns error on said record as follows:

I. The court erred in holding the indictment sufficient in these particulars:

1. That it sufficiently charged the statute offense without showing that the appellant was a male person or using any pronoun showing the sex.

2. In holding the indictment sufficient when it did not charge that the alleged cohabitation was with defendant's wives or persons held out as such, while the court held that the law only related to cohabitation in the marriage relation or under a claim of the marriage relation.

II. In holding that the act of Congress only related to cohabitation with women as wives or in the claimed married relation, thereby limiting the scope of the act, and as a consequence
50 holding that sexual intercourse was not material, and in pursuance of this construction erroneously rejecting evidence offered by the appellant, as follows:

1. The evidence proffered by the several questions put to the witness, Clara C. Cannon, on her cross-examination. Transcript, pages 14 and 15.

2. In overruling the questions put to the witness, Angus M. Cannon, Jr., on his cross-examination. Transcript, page 17.

3. In not permitting the witnesses, Clara C. Cannon and Angus

M. Cannon, Jr., to answer the questions put to them as aforesaid, the said questions being proper cross-examination on the same matters upon which the witness had been examined in chief.

4. In overruling the questions put to the witness, Clara C. Cannon (transcript, page 18), when called-in-chief by appellant, and in rejecting the proof of the facts sought to be shown by her, and while it was held that living in the same house with and holding
51 out two women as wives were the elements of the offense, the court refused evidence as to the manner of living, and that Clara C. Canon had not been held out as a wife, while there was no evidence at all of a holding out subsequent to the passage of the "Edmunds law," and no evidence of a holding out at any time except the acts sought to be explained and qualified by the evidence offered.

III. In holding that evidence of sexual or non-sexual intercourse was immaterial, and that the status of the marriage relation was all that need be shown, while section 8 of the "Edmunds act" as construed by the Supreme Court of the United States in Murphy *vs.* Ramsey, 114 U. S., defines the status of a polygamist, but does not make it a criminal one, while section 3 of said act defines the crime of unlawful cohabitation.

A reversal of the judgment is respectfully prayed.

F. S. RICHARDS,
Counsel for Pl'ff in Error.

Filed Oct. 14, 1885.

E. T. SPRAGUE, *Clerk.*

52 TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

I, E. T. Sprague, clerk of the supreme court of said Territory, in pursuance of the annexed writ of error, do return, hereto attached, said writ, the citation issued thereon, with proof of service endorsed, a transcript of the record and proceedings, the opinions of the court and of Justice Powers thereof, assignment of errors, and bond on writ of error, all in and of the cause in said writ described and in and of said court, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinions, assignment of errors, and bond, is a true, full, correct, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I have hereunto set my hand and the seal of said supreme court of said Territory, this 14th day of October, A. D. 1885, at Salt Lake City.

[Seal Supreme Court Territory of Utah, United States of America.]

E. T. SPRAGUE,
Clerk Sup. Ct.

Endorsed on cover: Utah Territory supreme court. No. 1169. Angus M. Cannon, plaintiff in error, *vs.* The United States. Filed October 21, 1885.

6—1169

116-55

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 1169.

ANGUS M. CANNON,
PLAINTIFF IN ERROR,

v.

THE UNITED STATES,
DEFENDANT IN ERROR.

From Supreme Court of Utah.

BRIEF FOR PLAINTIFF IN ERROR.

FRANKLIN S. RICHARDS,
For Plaintiff in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

OCTOBER TERM, 1885.—No. 1169.

ANGUS M. CANNON,
PLAINTIFF IN ERROR,
v.
THE UNITED STATES,
DEFENDANT IN ERROR.

From the Supreme Court of Utah.

Brief for Plaintiff in Error.

STATEMENT OF FACTS.

At the February term, 1885, of the District Court for the Third Judicial District of Utah Territory, the plaintiff in error was indicted for unlawful cohabitation, under section 3 of the Act of Congress approved March 22, 1882, entitled, "an Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes." Said Act is commonly known in Utah as the "Edmunds Act." And for brevity it is herein referred to as such. The indictment is found on page 1 of the transcript.

The plaintiff in error plead not guilty, and the case came on for trial in the District Court on the 27th day of April, 1885. After a jury was impanelled and sworn, and the

counsel for the prosecution had called a witness to testify in the case, counsel for the defense objected to the giving of any evidence under the indictment, on the ground that "the indictment is defective and does not charge any criminal offense, and that it does not charge any offense under the statute of the United States, or charge the offense described in the statute either in the statutory words or equivalent words, and especially that it does not show in any manner that the person charged is a male person, and is insufficient to warrant a verdict or support a judgment of conviction." (Transcript, p. 6.) The overruling of this objection is the alleged error specified in the 1st assignment of errors. (Transcript, p. 40.)

During the trial the Court held that the Act of Congress under which this case was prosecuted only related to cohabitation with women as wives, or in the claimed married relation, thereby limiting the scope of the Act, and as a consequence holding that sexual intercourse was not material; and in pursuance of this construction the Court erroneously rejected evidence offered by the plaintiff in error. (Transcript, pp. 8, 9, 10, and 11.) And while the Court held that living in the same house with, and holding out two women as wives, constituted the offense of unlawful cohabitation, it refused to admit evidence as to the manner of living, and rejected evidence to show that Clara C. Cannon, the alleged plural wife, had not been held out as a wife, while there was no evidence at all of a holding out except the acts sought to be explained and qualified by the evidence offered. The rulings of the Court excluding the evidence offered by the plaintiff in error upon these points constitute the 2nd assignment of errors. (Transcript, pp. 40 and 41.)

The Court held that evidence of sexual or non-sexual intercourse was immaterial, and that the status of the

marriage relation was all that need be shown, thus giving the statute an *ex post facto* construction and making the status of the plaintiff in error, which existed at the time of the passage of the Act, criminal, without proof of any unlawful act committed by him since the enactment of the law. (Transcript, pp. 8, 9, 10, 11, 12, 13, 14, and 15.) This constitutes the 3rd assignment of errors. (Transcript, p. 41.)

After the introduction of evidence, the plaintiff in error requested the Court to give certain instructions to the jury which were refused by the Court and other instructions given. (Transcript, pp. 11, 12, 13, 14, and 15.) To the rulings of the Court refusing the instructions asked, and to the instructions given by the Court, the plaintiff in error duly excepted and assigns the same as error.

On the 29th day of April, 1885, the jury rendered a verdict of guilty as charged in the indictment, and on the 9th day of May, 1885, judgment was rendered in said Court against the plaintiff in error, and he was sentenced to pay a fine of three hundred dollars, and to be imprisoned in the Utah penitentiary for the term of six months.

From the judgment of the District Court the plaintiff in error appealed to the Supreme Court of Utah Territory, where the case was affirmed. (Transcript, pp. 17 and 18.) And from this judgment a writ of error has been sued out from this Court. (Transcript, pp. 38 and 39.)

The questions involved in this case therefore are:

1st. As to the sufficiency of the indictment; and

2d. The construction of section 3 of the Edmunds Act. It reads as follows:

"That if any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hun-

dred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the Court."

Brief and Argument.

The construction of the statute just quoted and the definition of the term "cohabit," as used in it, are the all important questions in this case, and in numerous other cases now pending in Utah; and it is of the utmost importance to the people of that Territory that an authoritative construction of the law be had from this Court, defining the term "cohabit" as used in the Act, and determining what constitutes the offense of "unlawful cohabitation" under it.

The law says "that if any male person * * * shall hereafter cohabit with more than one woman he shall be deemed guilty of a misdemeanor," etc. The words of the statute are very general and require construction. This is evident from the first reading. The word "cohabit" seems to be used in a concrete sense like the words larceny, burglary, and other words that imply special defining facts, but the statute has not given the facts which shall constitute the prohibited cohabitation, and it is the first instance of its use in a criminal statute without any qualifying word to aid in defining it. It therefore needs construction—a restrictive construction.

Webster and other lexicographers substantially agree in two definitions of the word cohabit: 1. "To dwell with, to inhabit or reside in company, or in the same place or country. 2. To dwell or live together as husband and wife." If the Court were to adopt the first as evincing the intention of Congress it would lead to the most absurd consequences. That definition must be rejected as having no application to the word as used in this statute. It im-

plies no intimacy—no relation requiring legal regulation—certainly no restriction on account of difference of sex.

The other definition implies intimacy—sexual intimacy—and a degree of it illustrated by the dwelling together of husband and wife. *This statute is intended to prevent the living together of an adult male person with more than one woman in the same intimacy as is usual between husband and wife.* The statute means an habitual living intimacy requiring marriage to justify it. In other words, it forbids a man and two women to so live together as to amount to cohabitation, because both women can not be his lawful wives. Not only shall a man not marry more than one, but he shall not take to himself practically more than one woman to live with him without marriage.

All cohabitation which the law deals with is a sexual cohabitation. The law regulates and draws inference from it because it imports a living together in the habitual practice of sexual intercourse. No intimacy of the sexes is offensive to the public, nor criminal under this statute, unless it includes in fact or by necessary presumption sexual intercourse.

The word "cohabit" has never been used in any criminal law to mean anything less than actual sexual intercourse, and if the idea of habit and frequency implied in the word (as distinguished from isolated acts,) was not required, the word "cohabitation" in such statutes could be changed to "sexual intercourse," and the term "lascivious or lewd cohabitation," commonly found in statutes, can be paraphrased and made "lascivious and habitual or frequent sexual intercourse," without any change of signification. When in a civil case the question has arisen as to consummation of a marriage, the term "cohabitation" has been used as the equivalent of sexual relations, and could have no other meaning. So if the question is whether a marital

offense has been condoned, the cohabitation after knowledge of the offense means sexual intercourse only. (Dunn *v.* Dunn, 4 Paige, 425.) It is not necessary that the wife shall withdraw from the house. She may be unable to do so, and it is enough that she ceases cohabiting with the husband by withdrawing from his bed.

The popular use of the word, especially when applied to the relation of the sexes, conforms to this meaning; and whether we look to judicial proceedings, lexicographers, or common speech, the same signification is found.

Had Congress intended to use the word in a new signification, a definition would have been given to carry out the intent. The omission of the word "lascivious," is of no significance. Statutes against lascivious cohabitation do not refer to a cohabitation with more than one woman, but are directed against one who *lasciviously cohabits with any woman*, and the word "lascivious" only means wanton and unlawful, and that the woman is not the wife of the man. This statute against cohabiting with more than one woman retains the full meaning of the term lascivious, and perhaps more, for both women cannot lawfully be the wives of the man, and the cohabitation with at least one of them must be unlawful.

It is claimed that this statute only refers to cohabitation "in the marriage relation," and the Court below, in this and numerous other cases, has so construed it. The words of the statute give no color to such an interpretation, and if the public example of cohabiting with two or more women is an injury to society, the injury would not be less because in one case neither the man nor woman claimed any right, but knowingly acted as law breakers without any excuse of conscience or belief. *It is misleading to assume that this statute refers only to cohabitation under a marriage relation or claim of a marriage relation, and that*

the word cohabit relates only to those associating under the form of a marriage contract. Such an assumption treats the void marriage relation as a constituent of the offense and a part of its definition, instead of treating it only as a matter of evidence tending to raise presumptions of fact going to establish the offense.

Cohabitation does not mean the living together of husband and wife, but the living together of a man and woman as husband and wife live together. It refers to the manner of life and not the contract, and therefore includes the husband and wife and all men and women who assume their habits of living. Unless this is the meaning of the term, statutes against lewd and lascivious cohabitation could not be enforced unless the prosecutor could show a void marital contract or relation, and such statutes would fail to reach the cases intended to be included. In such cases it is the habit and frequency of visits and sexual relations which make the cohabitation.

The term cohabit has no reference to a marriage contract or claim of marriage, valid or void, but refers only to the habit of married persons, and unlawful cohabitation means those who adopt that habit without authority of law, and whether this adoption of the habit is or is not under a claim of marriage does not go to the constituents of the offense.

It is not permissible to limit the term "any male person" to the term "any male person who in a polygamous relation," etc. Such a construction would not only incorporate new words and create a new meaning, but would give an EX POST FACTO *application to the law by making a past act an essential part of an offense to which a new punishment was annexed,* and would revive past offences though prosecutions were barred by the statute of limitations.

The eighth section of the Edmunds Act shows that

this offense is not dependent on any marital relation. That section provides for the disfranchisement of every bigamist, polygamist, and person who cohabits with more than one woman. Here are two classes of persons subject to disfranchisement: the bigamist or polygamist who continues in the status but commits no offense under section three, and the person who thereafter violates the provisions of section three by cohabiting with more than one woman. There is no room for doubt under the language of section eight that a person who cohabits with more than one woman is within the prohibition, though he may be neither a bigamist nor polygamist, and that the person who shall cohabit with more than one woman represents in this section the place occupied by the "male person" in section three. Neither need be a bigamist or polygamist to violate the provisions of either section.

This Court in construing the eighth section of the Act, decided in substance that it is not intended as a punishment for the crime of bigamy or polygamy; that it declares the status of one who thereafter maintains those relations; that such status is not necessarily criminal or dependent on the continuance of sexual relations, but that it adheres to the person who has ever contracted a polygamous relation, until he, in some undefined way, abandons the relation. It is clear the status so defined arises out of the polygamous contract made at some past time, and is the effect of the contracted relation. No such status can exist with reference to the offense of unlawful cohabitation which is not dependent on any contract relation. The words "bigamist or polygamist" of the eighth section are construed to mean any one who in past time has been and still is in those relations, and do not imply an existing criminal status. The words "person cohabiting with more than one woman," in the same section, imply a present

criminal state punishable by the third section, and to this crime no status is given after the criminal act ceases. Thus a sharp contrast is drawn between a status non-criminal in itself, and which follows a polygamous contract, and the actual crime of unlawful cohabitation which, under the third section, can not be followed by any status after the unlawful act ceases. Other considerations already mentioned show that there can be no unlawful cohabitation presumed in law from any prior status, but the very gist of the offense must be proved as a fact. *The crime of unlawful cohabitation requires no marital contract as a constituent of the offense*, but consists solely in illegal acts irrespective of any contract, while the status declared by the eighth section arises wholly from the force of a contract, or a prior holding out of two women as wives, under such circumstances as to imply a contract. The criminal act of cohabiting with more than one woman is clearly a different thing from the act of maintaining (or dissolving) the status of a bigamist or polygamist. A person may hold out to the world by his acts, or by express assertions, that two women are his wives, and thus be in the status which deprives him of civil rights, but if he refrained from cohabiting with more than the legal wife he would not violate the third section of the Act.

By interpolating into the third section the words "as wives" or "in the marriage relation," the Court below has brought into section three and made illegal, or at least made an important part of the offense of unlawful cohabitation, the status of the eighth section which is not criminal and cannot be punished.

II.

Whether we are correct in the position that the cohabitation named in the statute implies matrimonial or sexual

intercourse, there can be no doubt that gross error was committed by the Court below in the trial of this cause.

The jury were instructed by the trial judge (Transcript, p. 11,) that, "If you believe from the evidence, beyond a reasonable doubt, that the defendant, (plaintiff in error,) lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty."

The issue here submitted was whether the plaintiff in error had *held out* these women as his wives *by his language or conduct*, because it was undisputed that they lived in the same house and ate at their respective tables substantially as stated, yet the Court excluded from the jury evidence offered by him to prove that he had, when the Edmunds Act was passed by Congress, and before its approval by the President, given up his marital relations with Clara C. Cannon. If this statement be too broad, then we say that the evidence offered tended directly to show this fact.

The bill of exceptions shows that the prosecution proved by Clara C. Cannon and other witnesses, her marriage with the plaintiff in error and cohabitation with him for ten years, but when he offered to show by the same witnesses, that "Amanda was married to him before Clara; that each, with her family, occupied separate apartments, including separate dining rooms and kitchens, and had taken their meals in their respective rooms; that after the Edmunds Law had passed both houses of Congress, and before its approval by the President, the defendant announced to witness, Amanda, and their families, that he did not intend to violate that law, but should live within it so long as it

should remain a law, and after that time, and during the times alleged in the indictment, he did not occupy Clara's room or bed or have sexual intercourse with her; that Clara and her family are dependent upon the defendant for support, and that he was financially unable to provide a separate house for her and her family," this evidence was promptly excluded.

In other words the plaintiff in error was not permitted to show, upon the issue made by the Court itself, as to whether he held these women out as his wives by words or conduct, that he had surrendered the highest and dearest right of a husband. Let it be admitted, for the sake of the argument, that sexual intercourse is not necessary to constitute the offense of unlawful cohabitation denounced by the Edmunds Act, and that the trial judge properly charged the jury to that effect, plaintiff in error still had the right to show, upon the question of whether he held out Clara C. Cannon as his wife, that by mutual consent he had left her bed, and had done so in consequence of the passage of the Act, and he had the right to show how they had since lived. The proof excluded was of the greatest importance upon the identical question submitted to the jury, for it showed both words and acts by the defendant indicating his intention to change his relations with the woman he had claimed as his wife.

If this evidence was properly excluded, it is difficult to see by what means any man, living with plural wives at the time of the enactment of the Edmunds Law, can escape the punishment it prescribes for "cohabiting with more than one woman;" no matter how anxious he may be to obey the law.

By what process or machinery of the law can he terminate his marital relations with a plural wife?

If he applies to a Court to dissolve the marriage, he

will be told that no marriage exists. If he appears in open Court and asks that an entry be made of record that this woman is no longer his wife, he will be told that the Court has nothing to do with any such transaction, and he will be silenced or held for contempt.

If he announces to his household, to his friends and neighbors, that he proposes to change his marital relations, observe the act of Congress, and thereafter cohabit with but one woman, and if he proceeds to act upon this declaration, and from that time is loyal to his legal wife, this avails him nothing.

He is indicted for unlawful cohabitation, arrested, brought to trial, and the prosecution shows him to have been a polygamist prior to the passage of the Edmunds Law; that he still lives in his dwelling house with two women, whom he had previously married, and with their families, supporting however separate tables and establishments; and the Court instructs the jury that if they find these facts to exist, and that he has held out these women as his wives, by words or conduct, they must convict. In vain he asks to be heard in order that he may show that by both words and conduct he has abandoned all marital relations with one of these women, and has obeyed the law.

He is sternly told that he cannot be heard, but that his doom is sealed.

Over the door of a Court like this, should be inscribed:

"Who enters here leaves hope behind."

It will be seen from an examination of the bill of exceptions, that the prosecution was permitted to show that the plaintiff in error and Clara C. Cannon occupied adjoining bed-rooms, with no intervening room. The unquestionable object of this proof was to show sexual intercourse, or such facilities as made the conclusion of its existence irresistible.

Yet the plaintiff in error on cross-examination was not permitted to show that the room of Clara C. Cannon was also occupied during the time charged in the indictment, by her two daughters and two nieces. (Transcript, p. 8.) Indeed no evidence of any kind was admitted for him showing or tending to show that he had not shared the bed of said Clara, or had sexual intercourse with her.

We submit that if evidence showing sexual intercourse, or facilities for it, was admissible against the defendant, evidence disproving, or tending to disprove the same fact, should have been admitted for him.

There is no evidence whatever that the plaintiff in error at any time after the passage of the Edmunds Law said or claimed that Clara C. Cannon was his wife. On the other hand he offered to show that he had declared his intention to obey that law, and to live within its requirements, knowing that it prohibited polygamy and unlawful cohabitation; and that he had so lived.

In any event gross injustice was done the plaintiff in error in not permitting his counsel to cross-examine the witnesses introduced by the prosecution as to the manner in which defendant had lived with the two women named in the indictment, both before and after the enactment of the Edmunds Law. It was for the jury to pass upon the good faith of his declarations and conduct, and he was entitled to have all the facts before them in order to show whether he had held these women out as his wives after the passage of the Act.

Even one of the Judges of the Supreme Court of Utah, who concurred in the judgment of that Court affirming the sentence, felt compelled to dissent from the extraordinary manner in which the trial was conducted.

In his separate opinion (Transcript, p. 35,) he says:

"I think there can be no question but what this testimony was admissible. True, the fact that the defendant did not have intercourse with these women would not be a defense, but, in view of the evidence elicited by the prosecution, it became proper. The Court in his charge could have instructed the jury as to the weight to be given to this evidence. We must remember that these questions were asked in cross-examination, and that great latitude is allowed. We must bear in mind, also, that the prosecution had shown on the direct examination that the defendant occupied a bed-room adjoining that of the witness, there being no intervening room. The evident purpose of the prosecution in eliciting this testimony was to enable the jury to infer that the parties enjoyed sexual intercourse. That is the natural inference that would be drawn from such testimony, and the defense were entitled to rebut it. That the prosecution understood that such an inference would be readily drawn is shown by their brief in the Musser case—a similar case to this, and argued at the same time. In that brief, speaking of the proof showing cohabitation, it is said: 'His (Musser's) bed-room is between the bed-chambers of the women, and open doors afford ready and easy access to the marriage beds.' It is plain that the testimony is open to the inference that I have drawn from it.

On cross-examination, anything that will explain, modify, or cut down the testimony drawn out on the direct is proper. 'A party always has the right to call out on cross-examination any facts within the knowledge of the witness which has a tendency to affect or qualify the evidence he has given in chief, whether it points to the same circumstances about which he testified or not. A more restricted rule renders cross-examination in many cases nearly valueless, and enables a party by careful questions to his witness to give to the jury a one-sided and partial view of the facts within the knowledge of the witness, and effectually to preclude the opposite party from supplementing the witness' statement with the further facts within his knowledge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to

vouch for him as credible, and has also a less privilege of searching examination.' (Det. & M. R. R. Co. *vs.* Van Steinberg, 17 Mich., 100.)"

III.

Manifest error was committed by the trial Court in not charging the jury that the prosecution was under the provisions of the Edmunds Act, and when that Act took effect, and that prior to that time cohabitation was not an offense. The jury should also have been told the meaning of the term "cohabitation," as used in the Edmunds' Law, and that unless the plaintiff in error had been proved guilty beyond a reasonable doubt, of such cohabitation with the women named in the indictment, since the passage of the Act and within the time charged in the indictment, they must acquit.

It is claimed that every other defect in the charge to the jury was cured by that portion of it telling them that the law presumed the defendant, (plaintiff in error,) innocent until proven guilty beyond a reasonable doubt. But this was not enough. The defendant was entitled to the instructions asked for by him, and the court erred in refusing them, and in not giving any equivalent instructions on the subjects to which most of the requests relate.

Wells on Law and Fact, Secs. 336, 486.
Livingston *v.* Ins. Co., 7 Cr., 544.
Taylor *v.* Hillyer, 3 Blackf., 433.
Campbell *v.* Campbell, 54 Wis., 90, 98.

Especially was there error in the Court's refusal to give the 15th and 16th instructions asked for by defendant, viz:

"15. The law presumes innocence, and therefore that

all persons who were cohabiting when the Edmunds Law took effect contrary to the provisions of that Act then ceased to do so."

"16. No fact in the conduct of the defendant subsequent to the passage of the Edmunds Act can be made more significant of guilt in violating the section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment prior to the passage of that statute."

The latter part of the 13th instruction should also have been given, as follows:

"That all the defendant's social familiarity with the mothers of such families, established prior to the passage of said Act, not shown to include all the particulars of cohabitation as the Court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal."

The Court refused to instruct the jury that they should acquit the defendant, if they found that he had not held out Clara C. Cannon as his wife since the passage of the Edmunds Law, as requested in the 20th instruction, (Transcript, p. 15,) and held that the status of the marriage relation was all that need be shown, thus making the prior marriage an ingredient of the offense, for which a new punishment is prescribed, and giving the statute an *ex post facto* construction in this case; virtually making the status of the defendant which existed at the time of the passage of the law, criminal.

But the most extraordinary defect in this remarkable judicial production is found in that portion of the charge which tells the jury that the defendant is charged with having on the first day of June, in the year of our Lord 1882, and on divers other days continuously between said

first day of June, 1882, and the first day of February, 1885, unlawfully cohabited, etc., and then, without confining the inquiry of the jury to these dates, tells them that if they believe from the evidence that the defendant lived in the same house with the women named in the indictment, and ate at their respective tables one third of his time or thereabouts, and held them out to the world as his wives, they must find him guilty. It is to be presumed in the interest of humanity and civilization, that the Court did not intend to instruct the jury to try the defendant (plaintiff in error,) for acts antecedent to the passage of the Edmunds Law; but whatever the intention, they were certainly so instructed.

And the peculiar manner in which this part of the charge is drawn is made more significant by the prosecution having been permitted to introduce evidence as to facts anterior to the passage of the Edmunds. Law. We submit that in a trial involving the liberty of a defendant this charge was gross error.

IV.

We approach now the question in this case more important than any other to the people of Utah. That Congress intended by the enactment of the Edmunds Law to put an end to the practice of polygamy in the Territories may be granted, but did Congress intend by any portion of that law to require the polygamous husband not only to cease living with his plural wives, but also to abandon the women themselves? Did Congress intend that the aged plural wife, the sharer of her husband's life work, and the mother of his children should be turned out by him to beg from door to door, or to die in the poor-house? Or that the younger plural wife should be cast into the street to

starve or become a harlot? The plaintiff in error in this case offered to show that he declared his intention to observe the Edmunds Law before the Act was approved, and that he did obey the law from that time; that he abandoned the bed of Clara C. Cannon, but permitted her and her children to remain in his house, not being able to provide any other home for them. There was not a particle of proof that he claimed this woman as his wife after the enactment of the Edmunds Law, but on the other hand he offered to prove by the witnesses for the prosecution that he had declared his intention to obey that law, and did obey it; thereby giving up his marital or polygamous relations with her. Upon these facts he was sent to the penitentiary.

If he was rightly convicted and sentenced, then the most important inquiry to that portion of the people of Utah who have practiced polygamy, but who are now anxious to obey the law, is whether they are expected to abandon entirely the women who have, under the sacred religious rites in which they believe, become their wives, and who are the mothers of their children; and if not, what their conduct towards them must be in order to conform to the requirements of the law.

From the rulings in the case at bar, it is evident that if the plaintiff in error had been financially able to build another house, distant any number of miles from that in which he lived, and had there domiciled Clara C. Cannon and her children, and had visited and provided for them, he would have been convicted and received the same sentence.

The theory of the Court below seems to have been that the polygamous status having once attached, and not having been removed, the defendant was guilty of unlawful cohabitation if he continued to furnish a home and pro-

vide for his plural wife, she living with her children, although he had declared his intention to obey the Edmunds Law, and had actually done so.

The logical result of the Court's rulings and sentence is to force every polygamist to abandon his plural wives and refuse to provide for them. His declarations are worth nothing, else why was the plaintiff in error not permitted to show that he announced his intention to put aside the plural wife and then conformed his conduct to such announcement?

If he had gone into the market places, or upon the house tops and proclaimed his intention to put her aside, and had still continued to provide for her and her children, and had visited her and them socially, or to discuss matters of mutual interest to them all, under the ruling of the Court below, he would have been found guilty of unlawful cohabitation.

Congress meant no such thing. Religion, humanity, civilization alike forbid it. The law-giver who would enact that the wife, taken under any rite, who had gone with her husband to a desert, and amidst its dangers and privations had helped to build a home, blessing him by her love, and that of the children she bore him, should be abandoned by that husband to destitution and want, would deserve the execration of every honorable man.

Congress did not mean it—for in the seventh section of the Edmunds Law it provided that the offspring of polygamous marriages born before the first day of January, 1883, shall be legitimate; and it is incredible that those who enacted this law expected the husband to provide for the children, but to drive from his home, and from them, their mother; or that he should be prevented from visiting both mother and children, and consulting with them as to the education and training of the children.

No tribe of savages have yet been found capable of this. Congress did not intend to stifle the dictates of humanity, nor to drive the mother from her child. The object was to stop the practice of polygamy, and after the polygamous practices had ceased, nothing but sheer brutality could require the abandonment of the plural wife to destitution and want.

Whether the polygamous relation yet exists, or whether the woman is still claimed and treated as a wife, should be determined by a jury upon all the facts in each case, and under fair and unequivocal instructions from the bench as to the law, but we protest against the liberty of any American citizen, even if a Mormon, being taken from him by such proceedings as were had in this case.

V.

AS TO THE SUFFICIENCY OF THE INDICTMENT.

The indictment is bad for the reason that it does not state a case including all the elements of the offense defined in the third section of the Edmunds Act.

We invoke the rule, which is settled beyond all controversy, that an indictment must allege all the facts necessary to fill every particular of the statutory or common law definition of the offense sought to be charged.

1 Am. Cr. L., Secs. 285, 288.
1 Bish. on Cr. Pr., Secs. 326, 509, 517.
1 Arch. Cr. Pl. and Pr., 86 and note.
State *v.* McKenzie, 42 Me., 392.
Koster *v.* People, 8 Mich., 431.
Wood *v.* People, 53 N. Y., 511, 513.
Brown *v.* Commonwealth, 8 Mass., 65.

The rule is elementary, and it would be a waste of time to collect the cases which affirm it.

The section of the statute on which the indictment is founded provides, "That if any *male person* in a Territory, * * * hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor." The indictment states that the "Grand Jurors * * * find and present that *Angus M. Cannon*, * * * on the first day of June, A. D. 1882, and on divers other days, and continuously between the said first day of June, A. D. 1882, and the first day of February, A. D. 1885, at the county of Salt Lake and Territory of Utah, did unlawfully cohabit with more than one woman, to wit: one Amanda Cannon, and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided. * * *"

Under the head first stated we rely on two defects of the indictment.

1. It fails to allege or show that the defendant is a "*male person*."

The rule of pleading just adverted to requires that the indictment should allege that the defendant is "a male person," for in no other way could the statutory offense be fully stated.

Where the offense consists of an act done by a person of a particular description, the indictment must allege that the defendant is a person of that description.

People *v.* Allen, 5 Denio, 79.
Ex parte Hedley, 31 Cal., 109.
Commonwealth *v.* Libby, 11 Met., 64.
The King *v.* John, 3 M. and S., 548.

In People *v.* Allen, the Court says:

"An indictment upon a statute must state all such facts and circumstances as constitute the statute offense, so as to bring the party indicted precisely within the provisions

of the statute (1 Chitt. Cr. L. 281, 283, ed. of 1841, Arch. Cr. Pl., 50, ed. of 1846.) If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place when (and where) the alleged criminal acts were perpetrated, were such as to bring the supposed offense directly within the statute."

The offense may consist of such acts as can only be committed by persons of opposite sex, so that the allegations of those acts will necessarily include an averment of sex corresponding to the nature of such acts. And so the name may affirm the sex. But unless the acts or name stated affirm that the defendant is of the sex mentioned in the statute, a material particular of the statutory offense is left out of the indictment.

If the misdemeanor includes no more than living in the same house, and does not import a living together *cum copula*, the averment of cohabitation implies nothing in respect to sex. The court below expressly held that sexual intercourse was no element of the cohabitation made a misdemeanor by this statute. Hence, the allegation that the defendant cohabited with two women has no significance to affirm the defendant's sex. The statute itself defines a particular cohabitation—that of *a male person* with more than one woman.

The defendant's name stated in the indictment does not import a male person. It is a family name—that of "The Douglass," in Scotland. Such names are frequently given to females. They are neuter, and are by general custom conferred indifferently on either sex. Webster's dictionary contains lists of masculine and feminine Christian names. Angus is not in either list.

2. The indictment does not allege that the defendant put forth any pretense of marital relation to the women therein mentioned.

The third section denounces all cohabitation of a male person with more than one woman. To confine it to a cohabitation with them, under a claim of marriage, the Court must interpolate words which the law-maker has not inserted. It is not competent so to interpret and change a statute.

Logan City *v.* Buck, 3 Utah, 301, 306.
Leoni *v.* Taylor, 20 Mich., 155.
Tynan *v.* Walker, 35 Cal., 639, 643.

But the prosecution advocated this restrictive construction, and the charge of the Court to the jury apparently adopted the same view, for otherwise holding out these women as wives would have been immaterial.

While we controvert the construction contended for by the prosecution, and insist that the section applies to all males who cohabit with a plurality of women, we contend that the indictment is not framed on that reading of the statute, which the Court below seemed to adopt. It is fatally defective if that construction is the correct one. It does not state a case within section three of the Edmunds Act if it refers only to matrimonial cohabitation.

It must contain allegations of fact filling every particular in the description of the offense as defined by construction of the statute.

Bates *v.* State, 31 Ind., 72.
Schmidt *v.* State, 78 *Id.*, 41, 44.
Commonwealth *v.* Slack, 19 Pick., 304.
Commonwealth *v.* Bean, 11 Cush., 414.
Commonwealth *v.* Stout, 7 B. Mon., 249.
The Mary Ann, 8 Wheat., 389.

Under the construction adopted by the trial Court this indictment should have alleged that the defendant cohabited with the women *as wives.*

As has already been stated, the issues involved in this case are of very grave importance to the people of Utah, and they are anxiously expecting from this honorable Court such a decision as will vindicate their rights and preserve their liberties as American citizens. With the fervent hope and belief that their expectations will be fully realized, the case is respectfully submitted.

FRANKLIN S. RICHARDS,
For Plaintiff in Error.

116-55

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

ANGUS M. CANNON, PLAINTIFF in error,
vs.
THE UNITED STATES.
} No. 1169.

BRIEF FOR DEFENDANT IN ERROR.

non and one Clara C. Mason, sometimes known as Clara C. Cannon, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

To this indictment the defendant pleaded not guilty, a jury was impanelled, and, on the 29th day of April, 1885, the jury rendered a verdict of guilty as charged in the indictment.

The defendant moved for a new trial upon the following grounds:

1. That the court misdirected the jury in matters of law, to wit, in charging the jury as he did and in refusing to charge as requested by defendant in each of the charges requested.

2. That the court erred in the decision of questions of law during the trial, viz, in admitting the testimony objected to by defendant, and in rejecting testimony offered by defendant.

3. That the verdict was contrary to law.

4. That the verdict was contrary to law and against the evidence in the case in this, to wit, that there was no evidence in the case sufficient to authorize the jury to find the defendant guilty of the crime charged as defined by the court. That there was no evidence that defendant ever held out to the world as his wives more than one woman, or cohabited with more than one woman after the passage of the act making such conduct criminal.

5. That the juror, A. M. Johnson, was not a qualified juror in the case, for the reason that he had been guilty of living in polygamy or bigamy, and his answers that he did not believe it right to live in that relation were not true.

6. That the court erred in sustaining the sufficiency of the indictment.

The court having overruled the motion for a new trial, the defendant filed the following bill of exceptions:

District court, third judicial district, Territory of Utah, county of Salt Lake. The United States *vs.* Angus M. Cannon.

This case came on for trial on the 27th day of April, 1885, and after a jury was impaneled and sworn, and the counsel for the prosecution had called a witness, counsel for the defense objected to the giving of any evidence under the indictment, on the ground that the indictment is defective, and does not charge any criminal offense under the statute of the United States, or charge the offense described in the statute either in the statutory words or equivalent words, and especially that it does not show in any manner that the person charged is a male person, and is insufficient to warrant a verdict or support a judgment of conviction.

The court overruled the objection, and the defendant, by counsel, then and there excepted.

CLARA CANNON, a witness called for the prosecution, was sworn, when defendant, by counsel, renewed the aforesaid objection to the indictment, with the same ruling by the court and the same exception by defendant above noted.

The witness testified:

My full name is Clara C. Cannon. I know the defendant. I have been his wife. I was his wife. I was married to him about ten years ago, and have since lived at 246 First South street, Salt Lake City. I live there now, and have lived in the same house since shortly after I was married. The defendant has lived in the same house part of the time, and in the same house during the past three years.

I have one living child, which is a child of that marriage, born January 11, 1882. I have had two

other children by that marriage, both born before the living one. In this house I occupy two rooms on the ground floor, a parlor and a dining-room, on the east side. My kitchen is back, not attached to my part of the house. I have occupied this part of the ground floor since I first went to live in the house. There is a hall running through the house on the ground floor, and the rooms I occupy on that floor are on the east side of the hall.

I know Amanda Cannon. She has lived in the same house that I live in during the past three years. She has occupied, on the ground floor, two rooms on the west side of the hall, beside her kitchen, which is attached to the back of the main building, and is not the kitchen I use.

I suppose Amanda Cannon is defendant's wife. I have heard him speak of her as his wife, as Mrs. Cannon, and she has lived in the house ever since I went to live there. She has nine children, I think. During the past three years I think all her children have been living there at home, but not all the time. My little child lives with me in my part of the house—I mean the child of this marriage. The children of Amanda Cannon live with her in her part of the house.

During the past three years, and prior to the month of February in this year, the defendant has been in the habit of taking his meals with me in my part of the house a portion of the time—about one third of the time. There were stated intervals; he took his meals with me every third day—with me and my children. I have a son and daughter grown up, and two orphan children.

He took his meals with me and the child of this marriage and the other children every third day. He took his meals with Amanda Cannon and her family one-third of the time. He took all three of

his meals with me every third day—on week days and on Sunday morning he had breakfast at my house—that is, he took his meals with me two days of each week and also his breakfast Sunday morning, which made one-third of the time. On Sunday he took his dinner at Sarah's and his supper at Amanda's.

There are four rooms on the second floor of the house used as bedrooms, and a hall with two of the rooms on either side of it. The rooms open into the hall. During the past three years I have occupied the bedroom in the northeast corner, and Amanda has occupied the one in the southwest corner of the house. The defendant has occupied the bedroom in the southeast corner. The room occupied by me as a bedroom and the one occupied by the defendant as a bedroom are on the same side of the hall, and there is no intervening room. The house I speak of is in Salt Lake County, Utah Territory.

Cross-examined:

My oldest daughter is twenty-three years old and my son twenty. I have a little girl, Clara Hardy, twelve years old, and a little girl ten years old, who are orphans. Their mother was a niece of mine, and when she died she left them to me. These, with my little daughter Alice, three years old past, are the members of my family. My daughter Alice was three years old last January. The two orphan children have lived with me for the last five years. The two little girls and my oldest daughter and the youngest daughter have occupied my room with me. We have two beds, and have all slept in that room.

Q. State whether that state of things and that relation with your children and the orphans continued until February last.

(Objected to by the prosecution, on the ground that it is immaterial, irrelevant, and incompetent.

The objection was argued, the prosecuting attorney announcing the objection was on the relevancy, materiality, and competency of the evidence offered, and that the objection was not on the ground that it was not a proper subject of cross-examination or that the offer was out of order, but that any proof tending to show non-access was immaterial; and defendant's counsel admitted and stated to the court that the evidence was offered as tending to show, with other evidence to be given, non-access during the time charged in the indictment, and as tending to disprove any presumption of sexual intercourse which might be raised by testimony of the witness.

The court sustained the objection, stating that the question presented by the objection had been deemed by both parties as being properly raised by the interrogatory objected to, and the defendant, by counsel, then and there excepted.)

Q. Was Amanda Cannon married to defendant prior to the time you were married to him?

(Counsel for the prosecution objected to the question as irrelevant, incompetent, and immaterial.

The court sustained the objection, and defendant, by counsel, excepted to the ruling.)

The following questions were severally propounded to the witness, counsel stating that the sole purpose for which the questions were asked was to establish non-sexual intercourse:

Q. Did you hear and know of the passage of the act of Congress usually called the "Edmunds act," about the time it was passed?

Q. What had been the habit of defendant prior to that time as to his occupation of your room and bed, and the room and bed of Amanda Cannon?

Q. About the time of the passage of that law did he say anything to you and the other members of

his family in respect to his intention to not violate that law, and what did he say?

Q. Did you assent to what he proposed?

Q. After that did any change occur in his habits as to occupying your room and bed, and what, if any, was the change?

Q. After March 22, 1882, has the defendant at any time occupied your room and bed, or has he had any sexual intercourse with you?

To each of these questions the prosecuting attorney objected, on the ground that the evidence sought was irrelevant, immaterial, and incompetent, and the objections were based solely on these grounds, and not to the form of the questions or time or manner of offering the evidence.

The court sustained each objection, and to the ruling on each the defendant, by counsel, excepted.

GEORGE M. CANNON, a witness for the prosecution, testified:

My father's name is Angus M. Cannon; he is the defendant here. My mother's name is Sarah M. Cannon. I have heard my father state he was married to Amanda Cannon.

Q. Have you heard your father state he was married to Sarah Cannon?

(Defendant, by counsel, objected to the question on the ground it is immaterial; that Sarah Cannon is not named in the indictment, or any marriage with her charged.

The prosecuting attorney explained that he intended to show Sarah and Amanda Cannon were married to defendant by the same ceremony, and that he offered the evidence to show whom he had a right to call as a witness.

The court overruled the objection and allowed the evidence for this purpose, and the defendant excepted to the ruling.)

WITNESS. I have heard my father say he was married to my mother and Amanda Cannon at one and the same time.

ANGUS M. CANNON, Jr., sworn for the prosecution, testified:

My father's name is Angus M. Cannon and my mother's name is Amanda Cannon. I have lived during the last three years in the same house with my father and mother. My mother has nine children; eight of them are living at home and have during this period. I took my meals there and slept there on my mother's side of the house. Have taken my meals at the same table with the rest of the family. My father has taken his meals about one-third of the time at Clara's, one-third of the time at Sarah's, and one-third of the time with my mother. About every third day he takes his meals with my mother and her children.

There are four sleeping apartments in the second story of the house; two on each side of the hall-way which goes north and south, and the rooms on each side open into the hall. During the period mentioned Clara C. Cannon has occupied the northeast bedroom, my father has occupied the southeast, and my mother the southwest bedroom.

Cross-examined:

Clara Cannon has occupied the northeast bedroom to my knowledge five or six years.

Q. Who occupied it with her?

(Objected to as immaterial, &c. Objection sustained, and defendant excepted.)

My father has occupied the same house with Clara and Amanda Cannon. I have not been at home continuously for the past three or four years. I have been away probably between five and six months,

and, with this exception, I have been there more than three years.

Q. Do you know where your father during that time passed his nights?

Objected to. Objection sustained, and defendant excepted to the ruling.)

The prosecution here rested.

GEORGE M. CANNON recalled for further cross-examination:

The substance of what my father said about his marriage to Sarah and Amanda Cannon was that he married them at the same time.

He said he married them prior to any act against polygamy, and when he considered it legal. He perhaps stated the year, but I don't at present recollect it. I am in my twenty-fourth year.

CLARA C. CANNON recalled by the defendant and testified:

I am a member of what is called the Church of Latter-day Saints, and I have been a member for twenty-four years. The defendant is also a member of that church. I don't know how long he has been a member, but it is ever since I first knew him. Mrs. Amanda Cannon is a member of the same church, and has been since I first knew her; that is thirteen years.

Q. Was Mrs. Amanda Cannon married to the defendant prior to your marriage to him?

(Objected to by counsel for prosecution, as irrelevant and immaterial. Objection sustained, and defendant, by counsel, excepted to the ruling.)

Defendant's counsel then made the following offer of proofs:

We offer to prove by this and other witnesses to be called that Amanda Cannon was married to the

defendant before the marriage with this witness; that prior to the passage of the Edmunds law he had alternately occupied the sleeping room and bed of each; that each, with her family, occupied and each occupies, separate apartments, including separate dining rooms and kitchens; that after the Edmunds law had passed both Houses of Congress, and before its approval by the President, the defendant announced to witness, Amanda, and their families, that he did not intend to violate that law, but should live within it so long as it should remain a law, and at the same time assigned his reasons for so doing, and thereafter and during the times alleged in the indictment, he did not occupy the rooms or bed of, or have any sexual intercourse with the witness, and to this extent, by mutual agreement, separated from the witness; that during all the time mentioned in the indictment, the two families have taken their meals in their respective dining-rooms; that defendant has taken his meals with the witness and her family in her dining-room two or three days each week; has provided for the support of the witness and her family distinct from other family expenses, and allowed them to occupy separate apartments in the same house occupied by him and Amanda, and this is the extent of his relations with the witness; and also that the defendant was financially unable to provide a separate house for witness and her family; also that the witness and her family are dependent on the defendant for their support.

To this offer and each paragraph thereof the prosecution, by counsel, objected, and the objection was sustained by the court, and the defendant excepted to the ruling.

The foregoing is all the evidence given in the case.

The judge then instructed the jury as follows:

The indictment in this case charges that the defendant on the first day of June, in the year of our Lord 1882, and on divers other days continuously between said first day of June, 1882, and the first day of February, 1885, did unlawfully cohabit with more than one woman, to wit, one Amanda Cannon and one Clara C. Mason, sometimes known as Clara C. Cannon. If you believe from the evidence, gentlemen of the jury, beyond a reasonable doubt, that the defendant lived in the same house with Amanda Cannon and Clara C. Cannon, the women named in the indictment, and ate at their respective tables one-third of his time or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.

It is not necessary that the evidence should show that the defendant and these women, or either of them, occupied the same bed or slept in the same room; neither is it necessary that the evidence should show that within the time mentioned he had sexual intercourse with either of them.

I will state the law presumes the defendant innocent until proven guilty beyond a reasonable doubt; that you are the judges of the credibility of the witnesses, the weight of the evidence, and of the fact, and if you find the defendant guilty, you will say in your verdict "We, the jury, find the defendant guilty in manner and form as charged in the indictment;" and if you find him not guilty, you will say, "We, the jury, find the defendant not guilty."

No further or other instructions were given to the jury.

The defendant requested the judge to instruct the jury as follows:

1. The offense charged is that defined in the third section of the act of Congress entitled "An act to

amend section 5352 of the Revised Statutes in reference to bigamy, and for other purposes," approved March 22, 1882, commonly known as the "Edmunds act."

(This instruction was refused, and to such refusal defendant duly excepted.)

2. That section is applicable to Utah Territory, and provides that if any male person here since March 22, 1882, has cohabited with more than one woman he shall be deemed guilty of a misdemeanor.

(This instruction was refused, and to such refusal defendant duly excepted.)

3. This section does not apply to male persons who have at successive periods cohabited with lawful wives, but only to contemporaneous cohabitation with two women.

(This instruction was refused, and to such refusal the defendant duly excepted.)

4. Cohabitation includes living together as members of one family, a consorting in social intercourse and eating and lodging together. They need not occupy the same bed, but there must be an equivalent intimacy.

(This instruction was refused by the court, and to such refusal defendant duly excepted.)

5. The word "cohabit" in this section is to be understood in a technical or restricted sense. It does not apply to all persons who live with each other under one roof as members of one family, but only to adults of different sexes who live together in the manner that husbands and wives do, including the intimacy of occupying continuously or for recurrent periods the same bed.

(This instruction was refused by the court, and to such refusal the defendant duly excepted.)

6. (Requested if the last refused.) The word "cohabit" in this section is to be understood in a

technical or special sense. It does not apply to all persons of opposite sexes who live with each other under one roof as members of one family, but only to adults of different sexes living together in the manner that husbands and wives do. So understood, it must include a continuous or recurrent occupying of the same apartments in the manner usual with persons of opposite sex who live in sexual intimacy.

(This instruction was refused by the court, and to such refusal defendant duly excepted.)

7. No case is within this section which does not include such association of a man with two women in their mode of living as to make it an example of immorality by necessarily indicating an habitual intimacy with each of two or more women by mutual consent.

(This instruction was likewise refused, and defendant excepted.)

8. The cohabitation which is made a misdemeanor by this section is an habitual residence or dwelling by a man with two or more women in intimate sexual relations.

(This instruction was also refused by the court, and defendant duly excepted.)

9. The ingredients of this offense are, first, that the person charged be a male person; second, that he has lived or dwelt with two women, either continuously at the same time or with each in alternate periods of time; third, that he has so lived with each of two or more women in such personal intimacy as to indicate that he has had sexual intercourse with them, respectively, at his and their pleasure.

(This instruction the court also refused to give, and to such refusal the defendant duly excepted.)

10. The court will interpret this Edmunds act by its terms and in view of the actual situation in this Territory of which the court is judicially cognizant,

and thus deduce that Congress intended to apply a corrective to polygamy and the anomalous status produced by its long practice.

(This instruction was also refused, and the defendant duly excepted.)

11. The act is intended to prevent any further polygamous marriages, and to prevent the continued cohabitation of persons who are already in polygamy. The section making cohabitation a misdemeanor has special or primary application to a cohabitation with a plurality of wives. This obvious intention indicates the ingredients of the criminal cohabitation—that it is a living together in the sexual intimacy usual between persons united in the marital relation, immoral in example for not having the sanction of lawful marriage, and pernicious in producing an illegitimate offspring.

(This instruction was refused, and the defendant excepted.)

12. This act legitimizes all children born prior to January 1, 1883; it authorizes amnesty to all offenders prior to its enactment, and thus it is shown that the act was passed in view of the long existence of polygamy in this Territory, and the multitudes of children born therein; it is merciful to those who have broken the laws against polygamy, and humane and paternal to the children born in polygamy.

(This instruction was refused, and the defendant excepted.)

13. This act does not command polygamous fathers to abandon their children nor to break off all communication with their mothers. Such fathers are at liberty and under the strongest moral obligation to support both. He may hold any friendly and familiar relations, other than sexual, naturally incident to the discharge of such duties. All his social familiarity with the mothers of such families, established prior to the passage of said act, not shown to include all

the particulars of cohabitation as the court has defined it, should be considered by the jury with the legal presumption of innocence, and the failure to establish such cohabitation entitles the defendant to acquittal.

(This instruction was refused, and the defendant excepted.)

14. The existence, at the time of the passage of the Edmunds act, of a polygamous relation between the defendant and the women mentioned in the indictment, though an illegal relation, is not, and cannot be made by the statute, evidence of any fact necessary to or tending to a conviction for violating the third section. Any enactment intended for such a purpose would be *ex post facto* and void.

(This instruction was refused, and the defendant excepted.)

15. The law presumes innocence, and therefore that all persons who were cohabiting when the Edmunds law took effect, contrary to the provisions of that act, then ceased to do so.

(This request was refused, and the defendant excepted.)

16. No fact in the conduct of the defendant, subsequent to the passage of the Edmunds act, can be made more significant of guilt in violating the section against cohabitation, by reason of the existence of the polygamous relation between him and the women mentioned in the indictment prior to the passage of that statute.

(This request was refused, and the defendant excepted.)

17. The defendant is entitled to show his marital and parental status at the time of the passage of the Edmunds act, to explain his subsequent conduct towards the women mentioned in the indictment, and to show an innocent and laudable motive therefor.

(This request was refused, and the defendant excepted.)

18. For this purpose he may show that he had families of children by said women, respectively, at and prior to the passage of said act; that such women and their children had been and were still dependent on him for their support; that he has continued since to support them; that he has visited them for that purpose, and as the father of said children and that he has not had sexual intercourse with such women since the passage of said act, and no inference of cohabitation can be drawn from the fact of such relations, from the fact of furnishing support for such mothers and children without living with them, nor from the fact of visiting them, taking meals with them, nor from his living in a separate suit of rooms in the same house, belonging to himself, as that occupied by them, if they occupied separate apartments and habitually live as a separate and distinct household, nor can such inference be drawn from all such facts. They do not of themselves constitute cohabitation.

(This request was refused, and the defendant excepted to the refusal.)

19. There is no evidence in this case tending to show this defendant recognized Clara C. Cannon as his wife, or held her out to the world as such, since the passage of the Edmunds bill and within the dates named in the indictment, and without such proof the jury should acquit the defendant.

(This request was refused, and the defendant excepted to the refusal.)

20. If the jury find that the defendant has not held out to the world and announced and recognized as his wife the Clara C. Cannon named in the indictment, since the passage of the Edmunds bill, and within the dates named in the indictment, then they should acquit the defendant.

(This request was refused, and to the refusal the defendant excepted.)

21. Sexual intercourse is a necessary element of the crime of cohabitation; and if the jury find that the defendant has not had sexual intercourse with both Clara C. and Amanda Cannon since the passage of the Edmunds bill, and within the dates named in the indictment, then they should acquit the defendant.

(This request was refused, and to the refusal the defendant excepted.)

22. In order to find the defendant guilty of the offense charged it must appear that the defendant had gone through the forms of marriage with both of the women named in the indictment, Amanda and Clara C. Cannon; that it not appearing in this case that he was ever married to Clara C. Cannon, the jury should acquit.

(This request was refused, and to the refusal the defendant excepted.)

23. If the jury find that there never was the form of marriage between Clara C. Cannon and the defendant, they should acquit.

(This request was refused, and to the refusal the defendant excepted.)

24. There can be no conviction under the indictment in this case, for the reason that there is no charge that the defendant was ever married to either Amanda or Clara C. Cannon, nor any charge that he held out either or both as his wives.

(This request was refused, and to the refusal the defendant excepted.)

The defendant also excepted to the charge given by the judge to the jury as follows: To that portion of the charge substantially in these words:

If you believe from the evidence, beyond a reasonable doubt, that the defendant lived in the same house

with Amanda and Clara C. Cannon and ate at their respective tables one-third of his time, or thereabouts, and that he held them out to the world by his language or his conduct, or by both, as his wives, you should find him guilty.

Also to that portion of the charge which instructs the jury that to constitute the offense it is not necessary the defendant should have occupied the same room, or slept in the same bed, or had sexual intercourse with either of the women named in the indictment.

The jury after being instructed as aforesaid retired, and returned a verdict of guilty on the 29th day of April, 1885.

The defendant moved the court to set aside the verdict and for a new trial on the grounds:

First. That the court misdirected the jury in matters of law, and erred in the decision of questions of law arising during the course of the trial.

Second. The verdict is contrary to law.

Third. The verdict is contrary to the evidence.

The motion was heard and overruled on the 9th day of May, 1885, and to the ruling the defendant excepted, and afterwards, on the same day, judgment on the verdict against the defendant was rendered, sentencing him to six months' imprisonment and $300 fine.

And the defendant assigns and specifies the following errors:

Error in law in admitting evidence under the indictment and holding the indictment sufficient.

Error in law in excluding evidence offered by defendant on the trial, in the several instances shown in the fore-

going bill, and by the several rulings to which the defendant excepted.

Error in law in refusing each of the defendant's requests for instructions to the jury.

Error in law in instructions given to the jury.

Error in law in refusing defendant's motion for a new trial on the grounds of misdirection to the jury in matters of law, and errors in the decision of matters of law arising on the trial.

Error in refusing to grant a new trial, on the ground that the evidence did not support the verdict, and in not holding the verdict, was contrary to the evidence.

The defendant having appealed to the supreme court of Utah Territory from the order of the district court overruling the motion for a new trial, that court, on the 27th day of June, 1885, ordered and adjudged that the judgment of the district court should be affirmed. To reverse that judgment of the supreme court of Utah this writ of error has been sued out, and is now prosecuted here.

The appellant assigns errors as follows:

I. The court erred in holding the indictment sufficient in these particulars:

1. That it sufficiently charged the statute offense without showing that the appellant was a male person, or using any pronoun showing the sex.

2. In holding the indictment sufficient when it did not charge that the alleged cohabitation was with defendant's wives, or persons held out as such, while the court held that the law only related to cohabitation in the marriage relation, or under a claim of the marriage relation.

II. In holding that the act of Congress only related to cohabitation with women as wives, or in the

claimed married relation, thereby limiting the scope of the act, and as a consequence holding that sexual intercourse was not material, and in pursuance of this construction erroneously rejecting evidence offered by the appellant as follows:

1. The evidence proffered by the several questions put to the witness, Clara C. Cannon, on her cross-examination.

2. In overruling the questions put to the witness, Angus M. Cannon, jr., on his cross-examination.

3. In not permitting the witnesses, Clara C. Cannon and Angus M. Cannon, jr., to answer the questions put to them as aforesaid, the said questions being proper cross-examination on the same matters upon which the witness had been examined in chief.

4. In overruling the questions put to the witness, Clara C. Cannon, when called in chief by appellant, and in rejecting the proof of the facts sought to be shown by her, and while it was held that living in the same house with and holding out two women as wives were the elements of the offense, the court refused evidence as to the manner of living, and that Clara C. Cannon had not been held out as a wife, while there was no evidence at all of a holding-out subsequent to the passage of the "Edmunds law," and no evidence of a holding-out at any time except the acts sought to be explained and qualified by the evidence offered.

III. In holding that evidence of sexual or non-sexual intercourse was immaterial, and that the status of the marriage relation was all that need be shown, while section 8 of the "Edmunds act," as construed by the Supreme Court of the United States in Murphy *vs.* Ramsey, 114 U. S., defines the status of a polygamist, but does not make it a criminal one, while section 3 of said act defines the crime of unlawful cohabitation.

In the first place the appellant claims that the indictment is defective, because it fails to allege that the defendant is a "male person." The indictment is founded upon the third section of "An act to amend section 5352 of the Revised Statutes in reference to bigamy, and for other purposes," approved March 22, 1882, and commonly known as the "Edmunds act." That section provides that—

> If any male person in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $300, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

It is not indispensable that the indictment should directly and expressly aver the sex of the defendant; his sex may be made to appear from his name as given in the pleadings. The name "Angus" is a proper name, and is recognized as that of a male person. The defendant, by pleading not guilty upon his arraignment, admitted the name to be correct.

The fact that the defendant is a male person sufficiently appears from the nature of the offense described in the indictment, and the recognized application of the name to a male person. All mankind are divided into two classes, viz, male and female. When the statute says that "if any male person shall hereafter cohabit with more than one woman, he shall be guilty of a misdemeanor, &c.," and the indictment charges that particular crime to have been

committed by the defendant with two women, the inevitable conclusion would seem to be that the person charged with the commission of the offense is a male person. The law, we think, would presume this, and, if so, its statement in the indictment would be unnecessary.

It is not reasonable to suppose that the grand jury intended to do such a vain and foolish thing as to indict a female for cohabiting with more than one woman. The offense forbidden in the third section of the act in question cannot, of course, be committed except by a male person; neither can the crime of rape be committed except by a male person, yet it is well settled that it is not necessary even under the strictness required at the common law to aver the sex of parties in an indictment for rape (Wharton Cr. Laws, vol. 2, sec. 574; Wharton's Precedents of Indictments, p. 189, note B; 2 Bishop Cr. Pro., sec 952).

While the true rule is that an indictment for a purely statutory offense is in general sufficient if it follows the exact language of the statute, it is not true that it must use the precise words of the statute in order to be valid.

As to the second objection to the indictment that it does not charge that the alleged cohabitation was with defendant's wives or persons held out as such, we submit it is a well-settled general rule that in an indictment for an offense created by statute it is sufficient to describe the offense in the language of the act (Wharton's Cr. Laws). Especially is this so of purely statutory misdemeanors (United States *vs.* Mills, 7 Peters, 138; The United States *vs.* Gooding, 12 Wheaton, 460). But few exceptions to this rule are recognized (1 Wharton Cr. Laws).

If the defendant insists upon greater particularity it

is for him to show that from the obvious intention of the legislature or the known principles of law, the case falls within some exception to such general rule (1 Wharton Cr. Laws). One of the exceptions is when the statute makes that an offense which was already an offense at the common law. Here if the language of the act is not sufficiently full and explicit to cover all the essential elements which enter into the offense as defined at common law, it would generally be necessary for the indictment to go beyond the mere words of the statute. Especially would this be so if there was no statute dispensing with the nicety and technicality of the common-law rules of criminal pleading (1 Wharton's Cr. Laws).

So again, as said by Judge Story in United States *vs.* Gooding (12 Wheaton, 475). "in certain classes of statutes the rule of very strict certainty has sometimes been applied when the common law furnished a close and appropriate analogy to the statutory offense." Such, he says, are the cases of indictments for false pretenses, &c.

Another exception doubtless is when the offense is described in such general terms in the statute that should the indictment follow the mere words of the act, it would fail to give the defendant the information to which he is entitled to enable him to prepare his defense; here, to use the language of Bishop, "the allegation of the indictment should be expanded beyond the statutory words." For instance, had the indictment in this case charged in the words of the statute merely that the defendant cohabited with more than one woman, without naming the women, a special demurrer on the ground that the indictment did not conform to the requirements of sections 150 and 151

of the criminal practice act of Utah, of 1878, would probably be sustained; for the defendant would be entitled to know who the women were that it was intended to claim he had so cohabited with. (See the case of U. S. *vs.* Simmons, 96 U. S., 360.) But had the offense been charged in this general manner, the defect, if defect at all, would have been waived by a failure to demur specially. (Criminal practice act, sec. 200.)

Mr. Bishop says:

> Anyone who reads our American decisions in detail and observes the diverse adjudications made upon the sufficiency of indictments drawn on new and unexpounded statutes, will observe two things: First, that some judges are more ready than others to accept the indictments which merely follow the words of the statute; secondly, that the tendency in modern times is to require an expansion beyond the words in fewer circumstances than formerly would have been demanded. But what partly accounts for both these facts is, that in some particular States statutes have expressly permitted wide departures from the common-law rules, while in other of the States the departures permissible are less in extent and less numerous.

This brings us to a consideration of the criminal practice act of Utah, and what may be said in connection therewith is intended to apply to both the objections to the indictment. We find at the very outset that all the forms of pleading in criminal actions and the rules by which the sufficiency of pleadings is to be determined are those prescribed by this act, section 148. If, then, this indictment will stand the test of these rules, it is suffi-

cient, no matter how much it may fall short of what would have been necessary at common law. (People *vs.* King, 27 Cal., 510; People *vs.* Cronin, 34 Cal., 191; People *vs.* Thompson, 4 Cal., 239.)

We find from section 150 that the offense must be stated with such clearness and particularity as will enable the accused to understand distinctly the character of the offense complained of, and to answer the indictment. Was it necessary in order to enable the defendant to understand the nature of the offense and to answer the indictment that the indictment should inform him by express averment that he was a male person? Again, can it be said that a failure to so inform has prejudiced, or tended to prejudice, him in respect to any substantial right? (See section 479.) But were it possible to answer both these questions in the affirmative, still we insist it is clear that the defendant waived the defect by failure to demur. (See section 200.)

The rules prescribed by the act by which to test the sufficiency of an indictment are found in section 158. There can be no pretense that this indictment fails to stand the test of any of these rules, unless it be the sixth, which is as follows:

> That the act or omission charged as the offense is clearly and distinctly set forth without repetition and in such manner as to enable the court to understand what was intended, and to pronounce judgment upon a conviction according to the right of the case.

Unless, therefore, upon a reading of this indictment the court should find that it is unable to understand therefrom what was intended, or that it would be unable to

determine from the indictment what the proper and lawful judgment should be in case of a conviction, it cannot be said that the indictment fails to meet the requirements of this rule.

Finally, we say in answer to the objection that the indictment fails to allege a real or pretended marital relation between defendant and the women named therein, it does allege that he cohabited with them. Now, one of the meanings of the the word "cohabit," as given by Webster, Worcester, and other lexicographers, is "to live together as husband and wife." If the defendant needed greater certainty or particularity of allegation to enable him to understand the character of the offense complained of, and to answer the indictment, he should have demurred specially. (Section 200.) By failing so to demur he waived the defect, if any such there was.

We come now to the consideration of the second and third assignments of error, which involve the question of the true interpretation of the third section of the act under which the indictment was framed. We submit that this depends entirely upon the meaning which should be given to the word "cohabit" as used in this section.

It has been strenuously argued on the other side that the fact of sexual intercourse was necessarily involved in the term as here used. This we deny, and say that neither in its popular nor its legal signification does it necessarily involve the fact of commerce between the sexes, unless it be coupled with some qualifying adverb, such as "lewdly" or "lasciviously," as is the case in the statutes of many of the States. (See the definitions of Webster, Worcester, and other lexicographers.) The meaning of the term expands

or contracts according to the context. It may mean "to live or dwell in the same country;" "to live or dwell in the family relation;" or it may mean "to live together as husband and wife." The context or subject-matter in connection with which it is used will always determine its meaning.

In the matrimonial law its meaning is well settled. It there means "to dwell together as husband and wife," and that, as there understood and settled, it does not necessarily include intercourse between the sexes is clearly shown by the fact that that law clearly distinguishes matrimonial cohabitation from matrimonial intercourse. (Orme *vs.* Orme, 2 Eng., &c., 354; Calef *vs.* Calef, 54 Me., 365; Commonwealth *vs.* Calef, 10 Mass., 152; Ohio *vs.* Conoway, Tappan, p. 58, 1st Bishop's M. & D., sec. 777, note, and cases there cited.)

We submit that Congress in the act in question was dealing with the marital relation. It is apparent from the first to the last provision of the statute that the exclusive object was to deal with and suppress, if possible, the pernicious marriage system which had grown up under the Mormon creed. That the intention was not to check or punish ordinary sexual sin is manifest from the fact that neither adultery nor fornication is made an offense under this law.

There was no necessity why Congress should undertake to deal with these offenses, for there was no class in the community for which the legislation was intended which was interested in encouraging or protecting these offenses. The local authorities were entirely competent to deal therewith, and might safely be trusted to do so. There is a

rule of interpretation that in construing the words of a statute the subject-matter of the statute is never to be lost sight of, and the words or terms are always to be understood as having regard to the subject-matter. (Potter's Dwarris, pp. 201 and 136.)

Marriage or the marriage system, as we have endeavored to show, is the subject-matter of the act in question. The term "cohabit" is then, we insist, to be construed with reference thereto, and to be given the sense in which it was used and understood in the matrimonial law, and we have already seen that the term as there understood meant "to live together as husband and wife;" and that matrimonial cohabitation is quite distinct in its meaning from that of matrimonial intercourse. The rule of interpretation that when a word or phrase having a well-known meaning in the law is used in a statute it is to be given the same sense in expounding the statute, is elementary (Harris *vs.* Reynolds, 13 Cal., 515, and cases there cited; Potter's Dwarris, 199–186). Hence, we contend, that if the term "cohabit," as understood in the matrimonial law, meant simply "to dwell together as husband and wife," it is the duty of the court so to interpret it in expounding this statute, which is dealing with the subject of marriage.

If, however, the court should be of opinion that the term in question has no well-known definite meaning in the law, and that it is a word of doubtful or uncertain signification, then we invoke what may be termed the primary rule of all interpretation, that the court must seek and ascertain the intention of Congress; the object which it sought to accomplish; the evil which it aimed to sup-

press; and having so ascertained it to give to the doubtful word or phrase that meaning which is best calculated to suppress the mischief and to advance the remedy; "putting down all subtle intentions and evasions for the continuance of the mischief, and adding force and life to the cure and remedy according to the true intent of the makers of the act." (Potter's Dwarris, pages 184, 185, 127, 128, 133, 138, 144, 175, 178, 194, note 13, and 201, note 18; U. S. *vs.* Freeman, 3 Howard, 565.)

What was the object Congress had in view in the passage of this act; what the evil it sought to remedy; what the mischief it aimed to suppress? Some light will be thrown upon this question, and some progress made toward a true solution thereof, if we can ascertain with certainty what evils or mischiefs are not within the scope or intention of the law. Now, manifestly, it would seem that the suppression of mere sexual sin was not its object, nor one of its objects, for we find that none of the ordinary sexual crimes or vices, such as incest, rape, seduction, adultery, or fornication, are within its provisions. Yet the argument on the other side is that it was habitual sexual intercourse between a man and more than one woman that this section was aimed at, and this only.

In seeking to fix the meaning of any clause or provision of a statute we are required to read it in connection with all the other provisions of the act, and to construe it in the light of and with reference to the general object and purpose of the enactment, as disclosed from an examination of all its parts. When we come to read this statute as a whole and, in the light of the circumstances which

called forth the legislation, it will be seen, we think, that Congress was seeking to accomplish a more important end than could be reached under the construction of its third section, as contended for on the other side.

No one can read this law and escape the conclusion that its great end and aim was the suppression of polygamy in the Territories. That this end might be more speedily and effectually attained, the design was, as we contend, that the polygamous home should be suppressed also; that it should cease longer to exist, to the great scandal of the nation and of civilization.

It was well known that though polygamy in the Territories had been made a crime by Congress many years ago, yet the law had been steadily ignored, and daily and flagrantly violated by the Mormon people; not only this, but their leaders, those in authority in their church, had through all these years openly and persistently urged upon them the transgression of this law as a religious duty, upon the observance of which their salvation in the life hereafter depended.

Clearly, it was desirable, if Congress wished the suppression of polygamy, that this class of persons should be made to feel the weight of the law, and be compelled to yield apparent respect and obedience to it, in order that they might be an example of such obedience to their followers. This could only be done by compelling them to put away their polygamous wives, for all of them, or nearly all of them, had taken their plural wives more than three years since, and could therefore no longer be prosecuted for polygamy.

Again, if the extirpation of polygamy was desired, what

folly it would be to suffer hundreds and thousands of people in the community, including its most prominent members, whose example would be likely to excite emulation, to continue ostensibly and openly to live in the practice and habit of polygamy, maintaining their polygamous households, and living and dwelling with their many wives. Such an example would be a daily temptation to others to violate the law.

It seems to be supposed, on the other side, that Congress could not have had any motive in prohibiting a man from living and dwelling in the same establishment with a half-dozen women claimed and reputed to be his wives, so long as he refrained from sexual intercourse with more than one of them; and it is claimed by the other side that they can discover nothing pernicious or dangerous in such an example, no matter how general the practice might be, nothing which would warrant legislative interference.

In any civilized monogamic community such an example would surely be regarded as evil and dangerous, and the more prevalent it became, and the more prominent those who set the example, the more apprehension it would inspire. No monogamic community would tolerate such an example, and if in any such community it should threaten to become prevalent, legislation would speedily be found to arrest it.

It may be that those who dwell in Utah have, through long familiarity with this evil, become more or less indifferent to it and its consequences. Surely if the object of Congress was to root out polygamy, it was only the part of wisdom to provide for the suppression of the polygamist's home, and to insist that the polygamist put away

his polygamous wives, and such, we believe, was the intention of this law. It is plainly susceptible of such an interpretation, and this interpretation is best calculated to suppress the mischief and advance the remedy.

Many of the requests for instruction, it will be seen, required the court to instruct on matters of fact; others had no application to the evidence, and others were sufficiently covered by the charge of the court. As to most of these requests, whether they were properly refused or not depends upon the true interpretation of the third section of the act under consideration.

If, as we contend, the law was aimed at the suppression of polygamy and the polygamist's household as an evil example and dangerous in its tendency to the family relation as recognized by the nation; if, in other words, it was not the offense against chastity merely, but the offense against the family, which lies at the foundation of all society and of the State, and upon the preservation of which we must rely as the surest safeguard of chastity itself, and of all the other social virtues, that Congress intended to suppress, then the court was justified in its refusal to charge as requested in defendant's requests Nos. 4, 5, 6, 7, 8, 9, 11, 13, 18, and 21, for in each of these requests the idea is put forth that sexual intercourse must exist to warrant a conviction, or that no degree of familiarity of association between the defendant and the women named, short of actual sexual intercourse, would be an offense against the law.

It is claimed that the duties devolving upon the plaintiff in error towards his children by his polygamous wives, and to his polygamous wives themselves, were so mani-

fold and delicate that it was impossible for the court to draw any line short of sexual intercourse with those wives, beyond which he could not go in his intimacy with them. It was upon that theory, manifestly, that all the above requests were drawn.

We insist that, to give effect to the spirit of the law, to give it life and efficacy, the line should be drawn so as to force the plaintiff in error to withdraw from the habitation of his polygamous and unlawful wife or wives. They should not be permitted to live and dwell together. This may be done, too, without interfering with him in the proper discharge of his duties to his polygamous wives and their children.

No secret understanding between him and his unlawful wives, by virtue of which he withdraws himself from their bed and continues to dwell with them, should be held to satisfy the law. The world knows nothing of such understanding. The outward appearance is the same; the evil example is the same as though no such withdrawal had taken place.

The offer to prove did not go beyond this, neither did any of the requests above referred to. It could not have prejudiced the plaintiff in error to refuse requests Nos. 1, 2, 10, and 12, for, if correct as abstract propositions, neither of them would have had any tendency to enlighten the jury in the discharge of their duties.

No. 3 was not applicable to the facts. There was no evidence tending to show "cohabitation at successive periods with lawful wives," therefore this was properly refused.

As to No. 14 we say that if plaintiff in error married

the women in question before the passage of the "Edmunds law," and continued to dwell with them after its passage, such prior marriage may surely be shown in a prosecution under the third section, for it tends to characterize the subsequent cohabitation—tends to show their living together as man and wives. Could an objection to proof of such prior marriage have been sustained? If not, request No. 14 was properly refused, for it claims that it is not evidence of any fact involved in this prosecution.

The same remarks are applicable to the No. 16 request.

As to No. 15 the court had already charged the jury that "the law presumes that the defendant is innocent until proven guilty beyond a reasonable doubt." This is the usual and approved charge in criminal cases upon the presumption of innocence. It included the very matter or principle involved in the No. 15 request. To tell the jury that the law presumes him innocent until proven guilty beyond a reasonable doubt, is to tell them that the law presumes he has not violated the third section of this act, for that is the very offense and the only offense with which he is charged. The jury would understand nothing else from the charge given.

No. 17 states a rule for the admission or rejection of evidence, which is for the court, and not for the jury. Moreover defendant's offer of evidence showed that he had lived in the same house with both the women in question, that he had eaten at their respective tables alternately, and that they were his wives. In other words, he cohabited with them. If so, he was guilty, no matter what his motives were.

No. 19 requested to charge upon the facts, and was in

direct antagonism to the testimony of Clara C. Cannon herself.

As to No. 20, the court had already charged that to find defendant guilty they must believe beyond a reasonable doubt that he had held both women out to the world, by his language or by his conduct, or by both, as his wives. Moreover his request was that he must have announced that Clara C. Cannon was his wife. This was clearly wrong. He could so recognize her by his conduct and by his acts, as well as by the most positive announcement.

No. 22 requested a charge on the facts, and not only so, but was in direct disregard of the evidence.

No. 23 needs no comment.

No. 24 is answered in the discussion of the sufficiency of the indictment. (See Indianapolis and Saint Louis Railroad Company *vs.* Horst, 93 U. S. Repts., p. 291.)

We submit that, as the rejected instructions, if given, could have done the defendant no good, and their rejection certainly did him no harm, it was not error in the court below to refuse them. While it may be true that in some of the instructions refused there may be isolated sentences that were proper, the court will not reverse for that reason, if all the material points involved were covered by the charge as given by the court below.

It is a well-settled principle that if the court below has given the law in its own language with substantial correctness, this court will not reverse merely because it did not give the law in the language employed by the defeated party. (Continental Insurance Company *vs.* Stead, 95 U. S., 161 ; Indianapolis and Saint Louis Railroad Com-

pany *vs.* Horst, 93 U. S., 291; Laber *vs.* Cooper, 7 Wallace, 565.)

We submit also, as to the evidence offered by the defendant on the trial, if the court shall be of opinion that it was error in the court below to reject it, or any part of it, the judgment of that court should not be reversed if this court shall be of opinion that the error was without prejudice. If the verdict of the jury would not have been different, even if the error had not existed, then the judgment pronounced upon that verdict should not be disturbed. All of the testimony taken on the trial is to be found in the record, and we insist that a careful examination will show the defendant to have been guilty as charged in the indictment.

In conclusion we beg leave to invite the attention of the court specially to the learned opinions of Justices Boreman and Powers, to be found in the record, and also to the opinion of Chief Justice Zane on the trial in the third district court of Utah, which is appended to this brief.

Very respectfully,

JOHN GOODE,
Solicitor-General.

APPENDIX.

UNLAWFUL COHABITATION, AS DEFINED BY CHIEF-JUSTICE CHARLES S. ZANE, OF THE TERRITORY OF UTAH, IN THE TRIAL OF ANGUS M. CANNON IN THE THIRD DISTRICT COURT, SALT LAKE CITY, APRIL 27, 28, 29, 1885.

The defendant stands indicted for unlawful cohabitation with Amanda Cannon and Clara C. Mason, sometimes known, as stated in the indictment, as Clara C. Cannon. The last named of these women was placed on the witness-stand and testified that she was married some ten years ago to the defendant, and that, as she understood, and as represented by the defendant, the other person, Amanda Cannon, was also his wife, or he claimed that she was; that he was living with them both, or rather in the same house with them both, one living on one side of the hall and the other on the other side; that by one of them he had some eight or nine children, and by the other three, the last of whom is living, and more than five years old.

The witness further stated that he took his meals one-third of the time in the house with her, one-third of the time with the other wife, and one-third of the time with some other woman, who, as I understand, did not live in the same house, although that was not clearly stated; and on Sundays he took a meal with each of the three. That they slept up stairs, the witness in a room in one corner of the house, the other wife in another part of the house, and the defendant in the northwest room. This was in substance the evidence. And upon cross-examination counsel for defendant asked the question, to which objection was made, and upon which this argument was had.

The court here requested the reporter to read the question to which objection was made. The reporter did so, and it was as follows:

"Q. Ask you to state whether that state of things and that relation with your children and the orphans continued until February last?"

He then read a few of the previous questions which showed more clearly what was meant by the pending question. They were as follows:

"Q. Have any of them occupied that bedroom with you?

"A. Yes; the two little girls and my daughter.

"Q. That was the eldest daughter?

"A. Yes, sir; and my little daughter. We have two beds, and we have all slept in that room."

The first question read by the reporter—which was the last question in the order of examination—was objected to, as counsel for plaintiff regarded it as an intention to show that the defendant did not occupy the same bedroom or bed with the witness, and as tending to show the absence of sexual intercourse; and counsel have treated the question as asked for that purpose, and I am disposed in deciding this objection to treat it as asked for the purpose indicated, and pass on it.

The counsel for the Government take the position that if matrimonial cohabitation exists it is immaterial whether sexual intercourse is practiced or not. The view of the counsel for the prosecution, as I understand it, is that if the defendant lived in the same house with these two women a portion of the time, and held them out to the world as his wives, it is immaterial whether they occupy the same bed or not.

Counsel for the defense insists that, in order to make out a case, it was essential for them to show actual sexual cohabitation with both these women, and that it was proper for the defendant, as a matter of defense, to show that such intercourse had not occurred. The language of the

third section of the act of Congress of March 22, 1882, which the defendant is charged with having violated, reads as follows:

"That if any male person in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court."

The counsel for the respective parties give to this word "cohabitation," in the connection in which it is used, different meanings, and have cited numerous authorities, reading a portion of them. Without having taken the opportunity to examine these cases referred to, further than what I learned of them from the reading, and from what I had seen of them before, it is evident that the cases were decided, some of them at least, and a construction was given to the word in a different connection from that in which it appears in this section. It appears, from the different meanings that are given to it, to be somewhat chameleon-like in its character, and changes its colors, owing to the circumstances, or conditions, and connections in which it is found. The statutes in which it has been used differ very widely in their language. Owing to this, and to the difference in the facts in cases in which the word has been used, the courts have not given to it a uniform meaning.

Courts sometimes adjudge cases to be analagous because they have some facts in common, when in reality they are not. I have not examined the authorities with sufficient care to express with any great degree of confidence as to where the weight is, and I am disposed to treat the language as of such doubtful signification in this section as to call upon the court to resort to construction. When the language is clear, and the meaning is precise and definite, there is no room for construction; the court must

merely read it as it appears. But if the import is doubtful, it is the duty of the court to construe it in the light of the rules which have been established for the construction of statutes and legal instruments. One rule, and it is probably always resorted to, is that the language of the particular provision to be construed should be considered in connection with the entire act in which it is found, and often in the other acts which may be considered *in pari materia*. And another familiar rule is, to ascertain the purposes of the law and the evil which it was intended to remedy.

The first section of this act defines polygamy and imposes a punishment much more severe than the punishment imposed upon unlawful cohabitation, and, taking the whole together, it would seem to be aimed at polygamy, and, in other words, the protection of the monogamic marriage. The purpose of this law was unquestionably familiar to the members of the National Legislature who enacted it, as the purpose should be familiar to all legislative bodies that attempt to make laws. The language used here seems to be directed against the relationship with two or more women, and has no application where it exists with one only.

The power and duty of regulating the relationship as exists between one man and one woman has been left by Congress to the Territorial legislature; but the relationship here mentioned is cohabitation with more than one woman. Its purpose would seem to be from the language itself—following the analogy to some extent of the first section, also must necessarily refer to the marriage relation between a man and two or more women.

It would seem that the purpose of this section itself was intended to protect the institution of marriage as it is understood in this country—the marriage of one man with one woman. If it had been aimed at adultery or fornication, the probabilities are that it would define adultery

and fornication between two individuals as a crime, and would not have confined or limited it to two or more.

The first section relates to formal marriages—marriages according to the forms of law, according to the forms adopted and sanctioned by law. But it is reasonable to assume that the authors of this act supposed that it might be difficult in all cases, as it unquestionably is, to prove a second or third marriage, and hence they have aimed this third section against marriages in appearance, and attempted to protect this monogamic marriage against even the appearance of any other kind.

A man, when he is in society, of course, stands in various relations to other persons—stands in relation to the Government, to society, to the various members of it, and in his own family, as he lives there, he occupies various relations—the relationship may be that of master and servant, not speaking of it in a servile sense, for that relation has disappeared; and as between the women of his family his relationships are distinct and well marked—ought to be at least. The relationship may be that of a man to his housekeeper or hired girl, if you please; may be that of father and daughter, or son and mother, or husband and wife.

The relationship here alluded to is that which exists between man and wife. This relationship of husband and wife is not like any other on earth, and the result is that it gives rise to a different class of conduct—conduct that grows out of this relation, which is different from any other—different from that which grows out of the relations of father and daughter, son and mother. Along it grow the flowers that adorn human nature and sweeten the domestic and social atmosphere. It is true, as the courts see sometimes, thorns grow, and it seems in some cases to be pretty much all thorns, but they do not belong to it.

It is a peculiar relation, and its well-marked conduct that belongs to it, properly, naturally is different from

that of any other; and, hence, when a man lives with a woman as his wife, the conduct that attends that living is different from any other kind of conduct, and it does not remain in the house altogether; it gets out of doors, among the people, and they see it.

I am disposed to think, after the learned and able discussion upon both sides, that this law was intended more particularly to prohibit the marriage between two or more persons in appearance only. The form is covered by the law with reference to polygamy, but that which is without the form and but the appearance of marriage, and which is shown and proved by conduct, is covered also by this law against unlawful cohabitation.

Error, custom, habit, among men, among people, is propagated largely by example, and the Congress of the United States, seeing that the church had engrafted on to its religion polygamy, and that the example of men who were the leaders in the community were practicing polygamy, living with two or more women as their wives, as it appeared to the public, they doubtless desired to remove that example, because the example of a number of men in any community, in high places, if it is wrong example, is dangerous; it spreads like some diseases, and it extends out into the community. The Government itself uses the example of punishment to prohibit so that it attempts to use, and the intention was to use the example of punishment of this offense, to remove the example, to eradicate it, and to destroy its evil effects upon the community. That was doubtless the object and purpose of this section.

That being so, the question is, of what does the example consist? All of the conduct growing out of an unlawful marriage is not seen by the public. A man does not repose upon his bed in the presence of the world, and there is a great deal in this institution of marriage, in the conduct that belongs to it, that occurs in the retreat from the gaze of the public, and nobody sees it but the man and woman themselves. It is hid from the

eye of the world, and it only affects society in its effects upon these particular individuals. But when the example is seen and observed by the public, it affects those who see it, so that the example of this unlawful cohabitation, or, if you please, of an unlawful marriage, where all of the conduct that belongs to marriage ordinarily occurs, that part of it which is seen outside, which the world sees, is the part which affects humanity, and that is the part that, doubtless, this law was aimed at, because there is no mention in the section of adultery, unless it must be inferred from unlawful cohabitation. It is the example that this statute was doubtless intended more particularly to reach.

As has been already intimated, the great purpose of this act was to protect the institution of marriage. The consequences of this construction have been referred to by counsel in their argument. If the consequences would follow such a construction as the court has intimated, it should have great weight.

But the conduct at which this law is aimed, according to the construction the court is disposed to give it, is the cohabitation with more than one woman, and the holding them out to the world as his wives. It is not necessary, in order for a man to even see that a woman has a home and support her; that he should live in the same house with her, and that he should hold her out as his wife; and it is not necessary, to the education and support of his children, that he should live in the same house with their mother. Under the monogamic system, of course, it is so. It would be better if, under all systems, it could be done without violation of law, that the children should not only be with the mother but with the father.

This law does not attempt to interfere with the care and education of the children. It is not an inhuman law—it is not cruel; it permits a man to do his duty—that is to say, it does not prohibit him from rearing his children, though they may be illegitimate; it is his duty

to bring them up; it is a duty that he owes to them to see that they are fitted for the responsibility of life—educate them, support them and it is a duty that he owes to society to see that they are raised properly; that so far as he is capable of they are made good citizens, useful members of society; and this law, of course, cannot prevent anything of that kind. It simply requires every man who has a wife to live with her, and her alone; treat no body else as a wife.

That is the institution that has come up out of the infinite past; it has crowded out of civilization every other kind of marriage. But in this Territory it seems that it is connected—has been ingrafted onto a religion. If it was free from religion, unconnected with it, it would not be difficult to manage it; but when people get an idea that there is an unseen Being who manifests all things, and that His will has been communicated to some prophet, and that therefore they are obeying His will, it is a difficult thing to manage it.

But, nevertheless, the people of the United States, through their agent, the Congress of the United States, have expressed their will that the monogamic marriage is the institution of this country, and that it is the only institution of marriage; that no other shall come in conflict with it, and they believe that it is one of the most important that exists in society. When it is undermined or removed, the social fabric that protects and shelters us all will be tumbling about our heads. They believe that that institution has taken woman by the hand, has brought her up out of ignorance, barbarism, degradation, slavery, and wrong, and placed her upon the glorious plane of equality with man; and they believe that they, hand in hand, on that equal plane, will ascend the glorious future, until civilization shall reach its highest summit; and they don't intend that any sect or people shall overthrow it, in the name of religion or otherwise.

And hence, according to the great principles laid down

in the Constitution and construed by the Supreme Court of the United States, they let religion alone, so long as it does not strike at society; but they don't treat it as religion when it breaks out into acts injurious to society; they prohibit it, and it is idle to say that this institution of polygamy is simply a question between individuals.

Any practice or custom that attacks society attacks us all, because society is all of us; that which attacks any individual or any class affects society, because the perfection of society depends upon the perfection of its units, and so the object of this law is to protect society against this institution of polygamy; and it has forbidden the form of marriage with more than one wife, forbidden a man to hold two or more women out to the world as his wives.

Without referring to the authorities which have been cited so extensively, I am of the opinion that it is not essential to constitute an offense against this law to show sexual intercourse. It is sufficient to show that a man lives with more than one woman, cohabits with them, and holds them out to the world as his wives. That being so, that he did not have sexual intercourse with them, or occupy the same bed with either of them, is no defense, and is immaterial, so far as the jury is concerned. It might be of importance in fixing the punishment; it might be a fact for the court to take into consideration.

The objection to the question for the purpose for which it is offered, is sustained.

116-75

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In the Supreme Court of the United States.

OCTOBER TERM, 1885.

ANGUS M. CANNON, PLAINTIFF IN error,
vs.
THE UNITED STATES.

No. 1169.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

ANGUS M. CANNON, PLAINTIFF IN error,
vs.
THE UNITED STATES. } No. 1169.

I beg leave to submit the subjoined extracts from the criminal-procedure act of the Territory of Utah, to be read as a part of my brief already filed in this case.

Respectfully,

JOHN GOODE,
Solicitor-General.

SEC. 148. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this act.

SEC. 150. The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2. A clear and concise statement of the acts or omissions constituting the offense, with such particulars of the time, place, person, and property as will enable the defendant to understand distinctly the

character of the offense complained of and answer the indictment. It must be substantially in the following form:

TERRITORY OF UTAH,
In the ——— judicial district court:

The people of the Territory of Utah, against A. B.

A. B. is accused by the grand jury of this court, by this indictment, of the crime of (giving its legal appellation, such as murder, arson, or the like, or designating it as felony or misdemeanor), committed as follows: The said A. B., on the —— day of ———, A. D. eighteen ——, at the county of ——— (here set forth the act or omission charged as an offense).

SEC. 158. The indictment is sufficient if it can be understood therefrom—

1. That it is entitled in a court having authority to receive it, though the name of the court be not stated;

2. That it was found by a grand jury of the district in which the court was held;

3. That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is to the jury unknown;

4. That the offense committed was within the jurisdiction of this court, and is triable therein;

5. That the offense was committed at some time prior to the time of finding the indictment;

6. That the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended; and

To pronounce judgment upon a conviction, according to the right of the case.

SEC. 200. When the objections mentioned in section 192 appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial in arrest of judgment.

SEC. 479. Neither a deposition from the form or mode prescribed by this act in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.

116-55

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

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THE UNITED STATES, DEFENDANT IN ERROR. } No. 1169.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Comes A. H. Garland, Attorney-General of the United States, and shows to the court that this is a criminal case, involving matters of general public interest arising under the third section of the act of March 12, 1882, entitled "An act to amend section 5352 of the Revised Statutes in reference to bigamy, and for other purposes," and an early decision is important.

Whereupon he moves such cause be advanced on the docket in pursuance of paragraphs 3 and 5 of rule 26 of this court.

A. H. GARLAND,
Attorney-General.